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STIPENDIARY MAGISTRATES AND LAY JUSTICES

From time to time criticism of lay justices becomes general, and the view is put forward that they should be replaced by stipendiary magistrates. As the controversy goes on, a number of lawyers, including present or past holders of the Great Seal, let it be known that in their view the system of lay justices should be retained. The last bout of this recurrent controversy began with the Report of a Sub-Committee of the Conservative Party, published in February, 1945. Correspondence in the London *Times* culminated in a leading article on April 4, 1945. A debate in the House of Lords on homeless children, on March 29, brought some weighty views in favour of lay justices. On October 19, 1945, the Lord Chancellor in addressing the Magistrates' Association said that he did not contemplate doing away with 'the great unpaid', but announced that he hoped a Royal Commission would be appointed to make recommendations on various questions relating to the magistracy.

In the *Modern Law Review* for March, 1945, Lord Chorley wrote upon 'The Unpaid Magistrate and his Future'. As I am still associated officially with various matters concerning magistrates it would not be right for me to plunge into this controversy, but in any case I do not want to do so. On many matters concerning the administration of justice we want more inquiry rather than more opinions. I have listened to many discussions about lay justices and stipendiaries, and found that the best contribution I could make was to supply information on some aspects of the setting of the question. I hope to follow this with a further paper on the administrative machine behind magistrates' courts, and on other outstanding problems, particularly procedure.

The appointment of stipendiary magistrates outside London and Manchester was first authorised by section 99 of the Municipal Corporations Act, 1835. If the council of a borough thought that it was requisite that a police magistrate or magistrates should be appointed, the council could make a by-law fixing the amount of salary they were prepared to pay, and

transmit the by-law to the Secretary of State. It should thereupon be lawful for His Majesty to appoint one or more persons, being barristers of at least five years standing, to be during His Majesty's pleasure police magistrate and a justice of the peace for the borough, and to direct payment quarterly of a salary not exceeding the sum stated in the by-law. There was a proviso that on a vacancy no new appointment should be made until the council made a new by-law and applied to the Secretary of State. The substance of the 1835 Act was reproduced in the Municipal Corporations Act, 1882, s. 161, with some change in language; the council now petitions for a stipendiary magistrate, who must be a barrister of seven years standing.

The Stipendiary Magistrates Act, 1863, authorises the appointment of stipendiary magistrates in places that are now known as urban districts where the population exceeds 25,000. The procedure for an appointment follows that of the Municipal Corporations Acts. There is no provision for the appointment of stipendiaries for rural districts or counties. Where a stipendiary is required for an area that is not coterminous with a municipal borough or urban district, a local Act is necessary.

There is little doubt that the framers of this legislation thought that there would be a widespread use of stipendiaries. The preamble to the 1863 Act recites:

> Whereas the execution of the office of justice of the peace within populous cities and places in England and Wales has become difficult and burdensome, the great and increasing extent of the populations therein, and the difficult and important legal questions that arise under various public and private acts, creating unreasonable demands upon the time of justices . . .

There is at present no appointment made under the 1863 Act, and I have been unable to discover a single instance of an appointment under it. The Municipal Corporations Acts have also produced fewer stipendiaries than might have been expected. Liverpool and Worcester had stipendiaries appointed in 1836, and then no appointments were made until those of Kingston-upon-Hull and Newcastle-on-Tyne in 1854. Between 1850 and 1900 fourteen boroughs got stipendiaries, and three boroughs during this century, the most recent being Huddersfield in 1931. Local Acts of last century created seven areas for stipendiaries.

The total of the number of places for which stipendiaries have been appointed is therefore twenty-six, but vacancies are not necessarily filled; if the local council does not choose to

petition, no appointments can be made, and the place may cease to have a stipendiary altogether or for a period until the council changes its mind. There are at present (January, 1946) sixteen stipendiary magistrates serving seventeen areas. In the following list those marked with an asterisk are appointed under local Acts, the rest being appointed under the Municipal Corporations Act, 1882: Birmingham, Bradford, Cardiff, East Ham, Huddersfield, Kingston-upon-Hull, Leeds, Liverpool, Manchester City, Merthyr Tydfil,* Middlesbrough, Pontypridd,* Salford,* Staffordshire Potteries,* South Staffordshire,* Swansea and West Ham. East Ham and West Ham since 1943 have shared a stipendiary. No place has more than one stipendiary. Manchester City had two stipendiaries from 1903 to 1909.

Nine places have in the past had stipendiaries and have not made any application for further appointments. In six of these places, marked with an asterisk in the following list, there was only one appointment: Birkenhead,* Brighton, Chatham and Sheerness, Grimsby,* Manchester Division, Newcastle,* Sheffield,* South Shields,* Worcester.* I think that the only instance of a place ceasing to have a stipendiary and later asking for one is Swansea, where there was a vacancy from 1901 to 1923.

The salaries of stipendiaries, which are paid out of local funds, vary up to a maximum of £1,850. There is no general provision for a retiring age or for superannuation. A stipendiary sitting alone, has the powers of two or more justices.[1] In three instances he has sole jurisdiction,[2] but the ordinary rule is that he and the lay justices have concurrent and equal jurisdiction. Whether a stipendiary does sit alone or with some lay justices, he acts as chairman, and the decision is that of the majority,[3] and if he sits with one lay justice and they disagree he has no casting vote and cannot overrule his colleague.[4] In areas having stipendiaries there are also courts

[1] Indictable Offences Act, 1848, s. 29; Summary Jurisdiction Act, 1848, s. 33; Summary Jurisdiction Act, 1879, s. 20; Interpretation Act, 1889, s. 13.

[2] Trade Union Acts, 1871 and 1876; Conspiracy and Protection of Property Act, 1875; Law of Distress Amendment Act, 1908.

[3] I do not think that this has ever been questioned, but there is no judicial authority for it unless it can be inferred from the case cited in footnote (4). It originated in Home Office advice based on an opinion of the Law Officers in 1855.

[4] In *R.* v. *Thomas, Ex p. O'Hare,* [1914] 1 K.B. 32, a stipendiary had sat with one lay justice and they had failed to agree. The stipendiary then said that he must decide the case himself, the lay justice said 'Very well', and the stipendiary convicted. The conviction was upheld on the view that the lay justice had withdrawn from adjudicating and the court became the stipendiary alone.

composed of lay justices. Where there is a large volume of work, requiring say three or four courts sitting simultaneously, or even seven courts at times as in Birmingham, the stipendiary does a far smaller proportion of the work than the lay justices. In other areas he may do half the work.

The summary judisdiction of lay justices is organised on the basis of county divisions, boroughs with separate commissions of the peace, and a few special jurisdictions.[5] A list of magistrates' courts is given in *The Local Government Manual and Directory*, published annually. County divisions are not often changed, as the procedure is clumsy,[6] and new borough commissions of the peace are not often granted.[7] There are about 1,000 courts, but it is not worth giving the exact figure because of the organisation inside county divisions and to a less extent inside boroughs. The justices for a county division may have more than one court-house and have regular sessions at more than one place. Provided the places are appointed and days fixed, there is no particular formality about such arrangements. Some county divisions have definite sub-divisions, either with the same clerk or with different clerks.[8] In boroughs the justices may also hold courts in more than one place. In large cities there is much to be said for the system of having a central court-house for the bulk of the work, but having some court-houses in outlying parts for certain work. There is also a curious system in some boroughs that have not got separate commissions of the peace, and where the mayor and ex-mayor, as statutory justices,[9] hold what is called the borough court for borough business, whilst the justices for the county division which includes the borough hold a separate court for non-borough cases.[10] If, therefore, by the number of magistrates'

[5] An example is Romney Marsh.

[6] Divisions of Counties Act, 1828; Petty Sessional Divisions Acts, 1836 and 1859. The Justices' Clerks Committee, Cmd. 6507, 1944, para. 100, recommended a new method of determining county divisions.

[7] Commissions of the peace are granted by the Crown on the petition of a borough council; Municipal Corporations Act, 1882, s. 156.

[8] Where courts are usually held at more than one place a salaried clerk may be appointed for each place, Justices' Clerks Act, 1877, s. 5. The unit remains the whole division, and the justices for the whole division must appoint the clerk for each court or sub-division.

[9] The Local Government Act, 1933, s. 18, which does not apply to London, provides that the mayor of a non-county borough shall be a justice for the borough and for the county, whilst the ex-mayor is a justice for the borough for one year.

[10] The whole thing is a muddle, because if a borough has no separate commission of the peace it is merely an undivided part of the county division in which it is situate, and business cannot be ascribed to part of the whole nor, if statute had not provided otherwise, would it seem possible for a man to be a justice for part of the area. As a person appointed mayor may not have had any

courts we mean the number of different places at which justices hold courts, the number is substantially more than 1,000, and is subject to fluctuations as various court-houses are brought into use or discontinued.

The list in the *Local Government Manual* gives the days on which each court sits, but that does not give an accurate basis for computing the number of sittings, because additional sittings may be held and more than one court may sit simultaneously. Thus, a borough which is listed as having daily sittings may, in fact, have six courts a week, or ten or twenty or more. There is no regular return, published or unpublished, that gives the actual number of sittings throughout the country.

Some estimate of the amount of work done by magistrates' courts can be made from the volumes of the *Criminal Statistics*, but the gaps in the information given are serious. Thus, the statistics give the number of orders made in the exercise of matrimonial jurisdiction, but no figures are available for subsequent applications to the court. A single order for wife maintenance may mean a number of subsequent proceedings for enforcement, variation or discharge, each of which may take up a substantial amount of time. The Money Payments (Justices' Procedure) Act, 1935, by requiring a means inquiry before committal for non-payment of a fine or periodic payment, has greatly increased the work of the courts, but this is not shown in the *Criminal Statistics*.

Everyone knows that in London the metropolitan magistrates do the bulk of the work, but the amount of the work done by lay justices is not always appreciated. First, the metropolitan magistrates' courts only serve part of the central area; apart from the stipendiary for East Ham and West Ham, the rest of the area of Greater London is served by lay justices, and this accounts for nearly half the population. Second, in the area of the metropolitan magistrates' courts the lay justices continue to do a substantial volume of work,[11] including virtually the whole of the work of the juvenile courts.

previous experience of acting as a justice, this arrangement may mean that such a 'borough court' is composed of a mayor with very little experience, and an ex-mayor with but little more. There is so much doubt about this jurisdiction that an ex-mayor of a borough without a separate commission is well advised not to adjudicate, but as that makes it impossible to hold a 'borough court' it is not welcome advice.

[11] The type of work done in the sixteen petty sessional divisions varies: liquor licensing, and summonses for rates, are general, whilst weights and measures and some other local authority prosecutions are taken at some courts. The Departmental Committee on Courts of Summary Jurisdiction in the Metropolitan Area, 1937, recommended an extension of the work of the lay justices, and more co-ordination with the metropolitan magistrates' courts. The policy

It is generally agreed that some reorganisation of magistrates' courts is needed. A number of small boroughs have separate commissions of the peace, thus having their own court with a small volume of business. The court for an adjoining county division is commonly held in the borough, so that an area that could be treated as a whole is served by two courts. On the 1931 census the figures are :—

Boroughs with Separate Commissions of the Peace

Population	under	5,000			...	28
,,	over	5,000	and under	10,000	...	32
,,	,,	10,000	,, ,,	15,000	...	29
,,	,,	15,000	,, ,,	20,000	...	12
,,	,,	20,000	,, ,,	25,000	...	13

The Justices' Clerks Committee recommended that separate commissions of the peace should, in general, be abolished for all boroughs with less than 25,000 population.[12]

A review of existing petty sessional divisions is also needed.[13] Changes in population and methods of transport mean that the location of court-houses needs reconsideration. This is not an easy matter when it comes down to practical planning. The main points that emerge are :—

(1) At present three needs have to be met : (a) the hearing of applications and the trial of cases, (b) people who want to consult the clerk, and (c) the handling of periodical payments. As to (b), justices' clerks do a large amount of advising the police and private persons; some of this advising is really incompatible with their status,[14] but they perform a public service that should and probably will soon be put on a proper basis. Much work is being done to see that the police have adequate facilities for obtaining legal advice, and the implementation of the Rushcliffe Report [15] will provide legal advice centres. As to (c), the main business is husbands paying weekly sums to the court and the court offices recording these sums and paying them out to wives. Many courts have an annual turnover of several thousand pounds a year, and office hours are arranged to suit the convenience of those attending to pay or be

cannot be carried out until there has been some rebuilding. The juvenile courts are organised on a special basis.

12 Cmd. 6507, 1944, paras. 96 and 97.

13 Cmd. 6507, paras. 96 and 100.

14 Justices' Clerks Committee Report, Cmd. 6507, paras. 51–54.

15 Report of the Committee on Legal Aid and Legal Advice in England and Wales, Cmd. 6641, 1945.

paid. The dispersal of people during the war has resulted in a great increase of payments by post instead of personal attendance; the cost of postage falls on the payors and payees, but with higher wages and higher payments this accounts for a smaller proportion of payments, and the post can be regarded as a normal method for those who cannot or do not want to attend personally. For the future, we should be able to consider the hearing of applications and cases as the determining factor in the sites for court-houses.

(2) In county divisions one court-house must serve several villages, and in selecting a place the chief consideration should be accessibility. In some areas public transport all comes into a centre like the spokes of a wheel, and it is easier for most local people to travel say ten miles into the centre than five miles round the rim. Further, most people can make some additional use of a visit to a centre. A substantial number of persons attending court are not local people, but motor drivers and witnesses who may live at a distance.

(3) There are advantages in a number of petty sessional divisions holding their courts in the same building in a centre. A good court-house should include: (a) at least two types of court-room, one for ordinary cases, and the other for the juvenile court, and preferably a third for the domestic court; (b) adequate accommodation for the justices' room, rooms or cells for prisoners, public waiting rooms, rooms for solicitors, probation officers, and offices for the clerk and his staff and probation administration. There are some modern court-houses that fulfil these requirements, but the ordinary run of court-houses is bad.[16] Many are merely rooms in police stations. Waiting and consultations must take place in corridors or in the yard. There are no books except *Stone*. It would not be economic to provide proper accommodation unless it is in frequent use, and that can be secured only by reorganisation. This does not mean that all the work would be transferred to the local centre. There is no reason why magistrates should not sit in outlying places to hear applications, but summonses granted would be made returnable at the central court-house unless it

[16] They fall below the standard of other public buildings. There are also some special points. Most people attending court are nervous and ample lavatory accommodation should be provided. Another fine point of court construction is the acoustics, which are often so bad that in new courts they have been made perfect, which is tiresome, as a solicitor cannot whisper to his client, nor one magistrate to another, without the risk of being heard all over the court.

appeared that there were good reasons for hearing the case at the outlying court-house.

(4) It is likely that in future a large proportion of cases in magistrates' courts will be taken by solicitors, partly through a greater use of solicitors by the police, prosecutions by local and central government as a consequence of controls and collectivist policy, and partly through better facilities for legal aid.[17] A local central court-house makes it easier, and hence cheaper, for solicitors to attend.

(5) It is a great convenience to have two or more courts sitting simultaneously. If a place has sufficient business to require say six courts a week, it is generally better to have two courts on each of three days, or even three courts on two days, rather than a daily court. It reduces the waiting about, facilitates a fixed time for an important case, and avoids the nuisance of one case unexpectedly holding up the disposal of the rest of the list. It is a little more expensive on the administrative side, but it is a definite saving of time and irritation to the public, police and solicitors.

A reorganisation of magistrates' courts on the lines of central local courts, probably with outlying sittings for applications and some other purposes, would not, of course, alter the total volume of work. It is not possible on the information available to say how many stipendiaries would be needed to replace lay justices on their present organisation. On a reorganised system it is by no means clear that the reduction in the number of courts would make it easier to man them by stipendiaries, for any extension of the desirable practice of holding two or more courts simultaneously would be difficult without the lay justices. Probably the number of stipendiaries required would be much the same under the reorganised system as under the present system. The Lord Chancellor (Lord Jowitt) said at the Magistrates' Association meeting in October, 1945, that replacement of the lay justices would require four or five hundred stipendiaries; I should hazard the guess that more would be needed.

It must be remembered that a stipendiary is not likely on the average to hold more than four courts a week and may well hold less. The most recent figures available show that in 1941 the metropolitan magistrates averaged 170 days a year.[18] In

[17] The Rushcliffe Report, note (15) above, recommends, *inter alia*, that legal aid should be available for both parties to civil matters before magistrates.
[18] Hansard for 9th Oct., 1941, col. 1120.

1935 the King's Bench Division Judges averaged 172 days of sitting, the figures for the following three years being 149, 161, 203, which gives an average for the four pre-war years of 171.[19] Summary jurisdiction is irritating work. In fact, one of the weak points of paid magistrates is that few men have the ability to remain good tempered and patient when they take courts day after day. The sheer boredom of much of the work sooner or later produces foolish remarks, and if the particular magistrate is not on good terms with the press his momentary lapse gets much publicity. Something of the same problem arises with divorce work, and the present policy appears to be to assign new judges to that work and then to send them to other divisions as occasion offers. The stipendiary will go on being a stipendiary until he retires or dies, and any attempt to step up his output is fatal to its quality.

The substitution of stipendiaries for lay justices would raise the question of the personnel of the many special tribunals created by recent legislation, for much of their work is akin to that of the justices or that of the county courts. If we are to continue to draw our lesser judges from practising barristers we should need a larger bar than at present to supply candidates for appointments, and it is difficult to see how a much larger bar could consist of practising rather than briefless barristers. It would probably be necessary to open these appointments to solicitors. The tendency would be for the lower judiciary to become a profession, appointed from youngish men who had obtained legal qualifications with the intention of securing such appointments.

But the choice for the future does not rest merely between retention of the present system and the universal use of stipendiaries. Several times in the history of our law we have been able to alter various features of an institution so that it has retained its main outline but has been revitalised and adapted to changing conditions. Three main things are required for this. The law as to stipendiaries should be reviewed, a better general standard of lay justices is required, and reforms are needed in the system of justices' clerks.

It is not clear what is the correct deduction to be drawn from the fact that so few towns have applied to have stipendiaries. Dr. Hanbury regards it as a 'testimonial of the

[19] Table XV of the *Civil Judicial Statistics* gives the number of days of sitting of the divisions of the High Court.

efficiency of the lay justices', upon which Lord Chorley comments that 'economy would be nearer the mark'.[20] It is certainly tempting to think that a borough would be unwilling to provide a salary for a service that lay justices will do for nothing, but the experience with recorders does not support this view. There are a number of small boroughs with separate courts of quarter sessions where there are very few cases for trial and often none at all,[21] yet these boroughs do not seem to mind going on paying to have a recorder and a borough clerk of the peace. Any borough with less than 10,000 population on the 1881 census can petition for the revocation of its separate quarter sessions, which would lead to the work being done at county sessions, at the cost of the county, but I have not come across any instance of this economy being sought. All this shows is that borough councils are not entirely 'economic man'. It is, however, obviously open to question whether a borough council is the most appropriate body to decide whether a stipendiary is needed and whether salaries should be a local charge. A recent inquiry has shown the need for considering the principles on which work should be allocated as between a stipendiary and lay justices.[22] The standard of the lay justices depends primarily on the method of selecting persons for appointment and the removal of 'dead wood'. A Royal Commission is not infallible either in diagnosis or prescription for social ills, but it is the best method the English have discovered for getting reforms in the machinery of justice. It is too often forgotten that when during last century England carried through remarkable changes in the legal system the legislative and administrative reforms were based on careful inquiry by Commissions. To the gibe that a Commission postpones action for a number of years, I would reply that without the report of a Commission we generally have to wait much longer.

The problem of justices' clerks has been the subject of a Departmental Committee,[23] and some account of the recommendations has been given in this *Review*.[24] The Report of that Committee has been well received. One criticism that is relevant here has been made about the position of the clerk. The argument takes this form: at present, it is said, the clerk

[20] 8 MOD.L.REV. 85.
[21] The business of each court is given in Table VI of the annual *Criminal Statistics*.
[22] Procedure at a case heard before two justices at Longton, Stoke-on-Trent; Report of an inquiry by Lord Goddard (1945).
[23] Cmd. 6507, 1944.
[24] Chorley, 8 MOD.L.REV. 9 *et seq.*

is often the dominating force in the court, and if justices' clerks become better specialists and more professionalised they will be still more dominant. There is no doubt that in some courts the clerk takes too much upon himself, but the pith of the matter is that unsatisfactory clerks and poor justices commonly go together. A good clerk—and the good ones are very good indeed—generally has a good bench. A general improvement in justices and clerks is the only remedy, but attention to some points of detail may help.

Criticism of the clerk's conduct in court is involved with questions of procedure, and I cannot go into that in this paper. It is the clerk retiring with the justices that annoys many people, particularly lawyers. It is said that the clerk tells the justices what their decision should be and what the penalty should be. Like many statements made about magistrates' courts, it may be true of some courts and certainly is not true of others. I know a considerable number of justices' clerks who would regard such a statement as a libel on them in their professional capacity. A justices' clerk who knows his job will not seek to retire with the justices unless he is asked to do so; he will then confine his advice to legal points. Justices who have not learned much about their duties do ask clerks for their opinion on matters of fact, or about previous convictions, or other things that should not be mentioned; a good clerk educates his justices by explaining to them what are their duties and what are his. In addition to legal advice, the clerk may be called upon to refresh the memory of the justices on some point of evidence by consulting the note made in court. As to the penalty to be imposed in a particular case, the most that the clerk should do is to say, if he is asked, what penalties have been imposed by other benches for a similar offence. With justices sitting on rotas it is desirable that some uniformity of sentences should be observed.[25]

My own view is, that the advice given by clerks when the justices retire could be given in open court; it might take up more time and be rather a nuisance, but if it would lead to greater trust in the courts it would be worth trying. Often the only reason for consulting the clerk is as to the maximum penalty and the complications of driving licence disqualification and endorsement. Uniformity as between different rotas can

[25] This, of course, applies only to lesser offences where fines are imposed, and it does not imply a rigid scale. Local papers are soon commenting if lampless cyclists have to pay 5s. on Tuesdays and 10s. on Thursdays.

be secured by periodical discussion between the justices or chairmen of rotas. When a Rule Committee is set up for summary jurisdiction [26] it might be as well to draft its powers so that rules could be made on the way in which the justices consult their clerks, and then, if the broader processes of improvement do not appear sufficient it would be possible to try detailed regulation. But ultimately you always come back to the people who work a system—the kind of people they are, and their training, and their will to act fairly and properly.

R. M. Jackson.

[26] Recommended by the Justices' Clerks Committee, Cmd. 6507, paras. 220–229.

REFRESHER EDUCATION FOR LAWYER VETERANS

I

THE bar of the common law world has given largely to the cause of the United Nations. Quite apart from the contributions to our common victory of lawyers in Government service and war industry on both sides of the Atlantic, many thousands of men and women of our profession have served in uniform from Newfoundland to the Siegfried Line and from Singapore to Okinawa. More than 25,000 lawyers and almost as many law students have served in the American armed forces, mostly in the combat branches.[1] They have been deck officers and seamen in the Navy and Coast Guard, they have commanded infantry or artillery or tanks or served in the ranks in the Army and Marine Corps. They have not, for the most part, been serving as lawyers, but as fighting soldiers and sailors and marines.

Now they are coming back, their immediate job done, most of them anxious to return to the practice of their chosen profession. And they are at a disadvantage. For that matter, all veterans are at a disadvantage in an unstable post-war economy. Our veterans have lost time; they have lost training; they have lost civilian experience and contacts. Their war experience is mostly not an asset in the business world or in the professions. Even the doctors, who have been exercising their professional skills in the service, are at a disadvantage compared with their professional brethren who have stayed at home.[2] They have lost patients, while their Army experience has not been such in most cases as to perfect them in the arts of civilian medicine.[3] With the lawyers, the case is even worse. For most of them, the law has been a closed book for three or four or five years, save perhaps for an occasional reluctant glance into the Manual for Courts

[1] See *Hearings before a Sub-committee of the Committee on Finance, U. S. Senate, on H. R. 3749* (1945) 139 (lawyers in the armed forces); Wicker, *Legal Education Today and in the Post-War Era*, 18 Tenn.L.Rev. 700, 701 (1945) (law students).

[2] On the needs of veterans of the medical profession for refresher education, see N. Y. Times, Oct. 14, 1945, p. 32.

[3] If I may be pardoned a personal anecdote, my battalion surgeon while I was commanding a Field Artillery battalion had been a gynæcologist in civilian practice.

Martial. They have lost clients and the opportunity to get clients. Their professional skills have become rusty, and those of them who went directly from law school to training camps have lost their normal apprenticeship at the bar. The least these men and women have the right to expect is that their re-establishment in practice be facilitated by effective and readily available means and at the expense of the Government for which they have cheerfully sacrificed their years spent in uniform.

The problem is of course not peculiarly American in any sense. It has been recognised and solved with considerable success in Canada, Australia and New Zealand, and will no doubt be adequately met in England. But some account of the experience of the American bar and law schools in dealing with this situation may be of interest to lawyers, and especially to lawyer veterans in England and elsewhere in the common law world.

II

THE problem in the United States is complicated, by reason of the fact that there are forty-nine distinct American legal systems, one for each State and one for the District of Columbia. There is no single final Court of Appeal, like the House of Lords for England and the Judicial Committee of the Privy Council for the Dominions on most matters.[4] To be sure, these forty-nine systems are rather similar, but they differ widely in detail as to matters of common law, and even more as to matters of legislation. There is more similarity, indeed, between the law of New York and the law of England than there is between the law of New York and the law of Louisiana or Texas.[5] The differences are much greater than those between the law of the Canadian Provinces or of the Australian States, since there the common law basis is at least in theory identical throughout Dominion and Commonwealth. On the other hand, as in Australia and Canada, there is a substantial amount of law which is wholly Federal and hence common to all of the United States.[6] The establishing of adequate refresher instruction for American lawyers, therefore, requires the careful

[4] Special limitations on appeals to the Judicial Committee from Eire and in constitutional cases from Australia are, of course, unimportant in this connection.

[5] Cf. my *English Law in the Making*, 4 MOD.L.REV. at 121 (1940).

[6] This is true not only of the law of the United States Constitution and of Federal taxation, but also of Patent Law and much of Administrative Law and Labour Law.

tailoring of the courses offered to local situations throughout a large and legally diverse country.

There are cognate problems which arise from the size and variety of the American legal scene. While the American bar does not have the barrister-solicitor differentiation, it does have much specialisation, especially in the larger cities. Trial lawyers, tax lawyers, corporation lawyers, patent lawyers, real estate lawyers, labour lawyers, divorce lawyers—all tend to be specialists. On the other hand, in the smaller communities, the lawyer must be something of a jack-of-all-trades. He is the family lawyer, the small business man's lawyer, the farmer's lawyer, and usually is an important political and civil force, whether interested in public office or not.[7] He needs to know more law in more fields than his metropolitan brethren of the bar, and in some fields, especially trial practice, he usually does, although he has less opportunity for systematic law study after his admission to the bar. The 'country lawyer' is just as much an American institution as the family doctor, or as the family solicitor in England. But he is quite a different proposition from the corporation lawyer of Wall Street or salaried legal representatives of General Motors.

An adequate system of refresher education in the United States must provide for local instruction in State law as well as for specialised instruction for many types of legal specialists, and must make such instruction available not merely in the big cities but throughout the smaller communities of the country.[8] Merely to state the problem is to indicate its magnitude. What can be done, and what has been done, to solve it? That is the question sought to be answered in this article, for such use as the answer may be to the legal profession in the rest of the common law world and in the other United Nations.

The problem is both educational and organisational. It is not alone necessary to determine what sort of refresher instruction is wanted and needed by lawyers returning from service with the armed forces, although this is difficult enough,[9] but

[7] For an entertaining account of the life and activities of a lawyer in a small American community, see Partridge, *Country Lawyer* (1939).

[8] While exact figures are not available, it seems probable that not over 35 per cent. of American lawyer veterans will return to practice in cities of 250,000 or more population, of which there were thirty-seven in the United States in 1940.

[9] For differing views on this subject, see Cheatham, *Post-War Legal Education and Service Men*, 19 Ind.L.J. 330 (1944); Wicker, *Legal Education Today and in the Post-War Era*, 18 Tenn.L.Rev. 700, 705 (1945). Compare the discussion of the subject in *Association of American Law Schools Handbook* (1944) 57–72, 215–227. Cf. my testimony before the Senate Sub-committee on Veterans' Legislation, in *Hearings before a Sub-committee of the Committee on Finance, U. S. Senate, on H. R. 3749* (1945) 134–148.

it is essential to make the needed educational facilities available at the times and places they are wanted, and throughout the forty-eight States so far as possible.[10] Obviously, the problem is a national one, although requiring the widest local co-operation, and it is on this basis that the American bar has sought to solve the organisational problem. To understand the reasons for the solution attempted, it is necessary first to know the forms in which the legal profession of the United States is organised, and to consider the part which the American law schools can and will play in the implementing of a national veterans' refresher programme.

III

The most important professional association of lawyers in the United States is the American Bar Association.[11] It has some 32,000 members, and has rendered significant service in improving the quality of American legal education and raising standards for admission to the bar.[12] It does not, however, include all American lawyers, nor is it a federation of the forty-eight State bar associations, each of which is separately organised; nor does it include in its membership the numerous local bar associations throughout the country.[13] In the American Medical Association, for example, a physician or surgeon by becoming a member of his local medical association automatically becomes a member of his State association and thus of the American Medical Association. But although a lawyer in New York City, for example, may belong to the New York County Lawyers' Association, the Association of the Bar of the City of New York, the New York State Bar Association, and the American Bar Association, as well as others,[14] he must join each separately and pay dues to each. But the American Bar Association, although not inclusive of State and local bar

10 Cf. *Lawyer Veterans Look to the Bar for Refresher Programs*, 31 A.B.A.J. 461 (1945).

11 Until 1937 the American Bar Association, organised in 1878, was the only national lawyers' organisation except for specialised groups, as, for example, the Federal Bar Association, the Association of Practitioners before the Interstate Commerce Commission, and the like. In 1940 its membership included 17.8 per cent. of the lawyers of the United States. The National Lawyers Guild, organised in 1937, had 3,774 members in 1938, the latest published figure. See Brown, *Lawyers and the Promotion of Justice* (1938) 149. This was approximately 2.2 per cent. of the lawyers in the United States.

12 See Brown, *Lawyers and the Promotion of Justice* (1938) 45–50, 134–141.

13 There are 137 city bar associations and 637 county and regional associations in the United States.

14 As, for example, the Veterans' Bar Association and other special bar groups, as well as the New York Chapter of the National Lawyers' Guild.

associations nor of all American lawyers, is the most representative national bar organisation, and the obvious organisation to take the lead in any national plan of refresher training for lawyer veterans, working through the State and city bar organisations.

In twenty-five of the United States, all the lawyers in the State are organised as a State bar, membership in which is compulsory.[15] This plan of a unified or integrated bar, which may be likened to the Inns of Court and Law Society combined into one, has made substantial headway in America since it was first tried in North Dakota in 1921.[16] Where an integrated bar exists, it may itself become active in veterans' refresher activities, as, for example, with the State Bar of California,[17] or it may leave the matter to the local bar associations or to the law schools. Local associations, in turn, may be large and well organised, as in most of the larger cities, with substantial funds and a paid permanent staff, or may be small, impecunious and often inactive, as in many rural counties. There are no integrated or unified local bar organisations of the inclusive type. Some local bar associations are active in veterans' refresher work, as for example, the Chicago Bar Association; others are not.

There are ninety-four law schools in the United States which are members of the Association of American Law Schools, and fifteen others which have, though not members of that Association, been approved by the Section of Legal Education and Admissions to the Bar of the American Association.[18] In the academic year 1940–1941, prior to Pearl Harbour, these schools had over 28,000 students. After the United States was in the war, law school enrolments dropped sharply to 4,800 in 1943, as students and prospective students entered the armed forces or other war service, as did many faculty members.[19] But with demobilisation, enrolments have risen rapidly, with every indication that the pre-war figure will be greatly exceeded by

[15] See *West Virginia State Bar Puts Integrated States in Majority*, 28 J.Am. JudicatureSoc. 165 (1945). The most populous States, however, with the exception of California, do not have integrated bars. About 36 per cent. of American lawyers practice in States having bar integration.

[16] See Essery, *Bar Integration*, 19 J.Am.JudicatureSoc. 175, 177–180 (1936).

[17] Mathes, *Refresher Courses for California Lawyer Veterans* (May-June, 1945) 20 J.S.B.Calif. 116.

[18] The Association of American Law Schools, while an organisation of educational institutions and not of individual law teachers, actually serves many of the same professional functions as the Society of Public Teachers of Law.

[19] See Wicker, *Legal Education Today and in the Post-War Era*, 18 Tenn.L.Rev. 700, 701 (1945).

1946.[20] Most American law schools will have their hands full in coping with this increased enrolment, and some will therefore be unable to participate in any plans for refresher instruction for returning veterans who have already completed their law school courses. Such participation is most probable in the case of the State university law schools, which in many States have very close relation with the bar.

IV

In this setting, the American Bar has sought to work out a flexible national plan for the co-ordination and mobilisation of local resources to provide adequate refresher instruction to its returning lawyers who have served in the war. This plan has been developed for the Section of Legal Education of the American Bar Association by the Practising Law Institute,[21] which for twelve years has been engaged in giving practical courses for lawyers in New York City,[22] and in 1943 extended its activities on a national basis.[23] The plan developed by the Institute and made available to the State and local bar associations, and to the law schools, is designed to furnish the maximum assistance to them in the presentation of adequate refresher courses for lawyer veterans in each of the United States. The plan contemplates a series of courses designed rapidly to refit lawyers for practice, using materials to be supplied centrally, so far as practicable, where desired. It involves four recommended refresher courses.

1. *State law and procedure.* Most returning veterans want to regain the 'feel' of their profession. The man who has 'forgotten all the law I ever knew' wants to start again to think and talk like a lawyer. Although some veterans believe they want lengthy reviews of the law they learned in law

[20] Increased enrolments are greatly encouraged by the circumstance that veterans can attend school largely at Government expense under the Servicemen's Readjustment Act of 1944, Public Law No. 346, 78th Congress, 2nd Session.

[21] The Practising Law Institute is a non-profit educational institution approved by the New York State Department of Education as a post-graduate school. Its president is former Under Secretary of the Treasury Arthur A. Ballantine, and its board of trustees includes Secretary of War Robert P. Patterson, Assistant Secretary of the Navy H. Struve Hensel, Judge Thomas D. Thacher of the New York Court of Appeals, formerly Solicitor-General of the United States, and Dean Young B. Smith of the Law School of Columbia University. Its founder and present director is Harold P. Seligson, Esq., of the New York Bar.

[22] These have for the most part been evening courses and clinics given by prominent practising lawyers, but there have also been several full-time summer sessions which have been attended by lawyers from all over the United States.

[23] Since November, 1943, courses on Federal Taxation have been organised in thirty-eight cities in twenty-four States.

school, and although some law schools seem disposed to encourage that idea by offering long review courses,[24] the national plan proceeds on the theory that a rather brief review of substantive and adjective law will be sufficient, especially if concentrated on the immediately practical objective of studying the peculiarities of the veterans' State law and procedure against a general common law background. Only a few veterans need to relearn their law; for these, long courses may be a help, although it may be doubted whether even such courses will help them much to become ornaments of the bar. But with most, it is like remembering how to ride a bicycle; all that is needed is a little practice, and the old skill comes back.

The type of review course contemplated is not unlike the bar review courses common in the United States before the war—brief lecture courses taken by law school graduates in preparation for State bar examinations. In most States, veterans who have finished law school, but were not admitted to the bar before entering the armed services, must still take bar examinations; for them such a course is almost a necessity. But even in States like New York, which waive bar examinations for veterans under such circumstances, such a course is the best possible initial review, and will, in most instances, render unnecessary and undesired any further detailed review of substantive and adjective law as such.

These courses in State law and procedure must be organised locally, with local lecturers from the State bench or bar or law schools, and this is being done in a considerable number of larger cities in various States.[25] For the benefit of those organising such courses, a brief text-book on New York law and procedure, prepared especially for such refresher courses in New York State, is being made available to bar associations and law schools in other States as a possible pilot model.[26]

2. *General and trial practice.* Returning lawyer veterans need and want more than a brief review of 'law-school law'. Most of them have missed their apprenticeship. Thousands

[24] For example, the Law School of St. John's University, Brooklyn, N.Y., is offering a twenty-four-week refresher course of 228 lecture-hours, which attempts to reteach substantially all the subjects of a normal law school course. This is, perhaps, an extreme example.

[25] For example, Boston, Mass., and Chicago, Ill.

[26] This volume, Medina, *Summary of New York Law and Procedure*, will be published early in 1946. Its author, a practising lawyer of distinction, for years conducted one of the most successful bar review courses in the United States, and was at one time Professor of Law at the Law School of Columbia University.

have gone directly from law school or bar examination into uniform. And even those who had some experience in practice prior to entering the service have become rusty in the lawyer's art. American legal education has not been directed toward producing practising lawyers, but rather to giving adequate academic training for learning the arts of practice by experience in practice. For the lawyer veterans of this war, that experience has been denied or postponed or forgotten. The need is for a method of supplying the practical knowledge required for effective practice as expeditiously and completely as possible without additional wasted years. It is a problem of teaching, not law, but how lawyers do things.

American lawyers do two main sorts of things—they advise clients and conduct office practice, and they try cases. They are both solicitors and barristers. Both of these practical sides of the profession can be taught, although not in university law schools or by law school methods.[27] This has been proved by twelve years' experience with practical post-admission courses for lawyers given by the Practising Law Institute in New York City. The problem is how to make this teaching technique available throughout the United States.

Fortunately, differences in State law are relatively unimportant in this practical field. A witness is cross-examined or a negligence case prepared for trial in much the same way in Texas and Ohio as in New York. The practical problems of how to organise a corporation for a particular business purpose are not greatly variant in the several States, although the corporation statutes involved may differ. This makes it possible to prepare short practical handbooks by practising lawyers expert in each of these subjects, which can readily be used as text-books and as the basis for lectures in each State by local practitioners, who can illustrate the principles involved by examples and, at the same time, point out particular variants in the State practice. Such a series of handbooks is now in preparation, covering the fields of General Practice (advising clients and office practice)[28] and Trial Practice, including preparation for trial, the trial itself, and trials in particular actions,[29] and will be ready for use early in 1946.[30]

[27] Cf. my article, *The Function of the University Law School*, 49 Harv.L.Rev. 1068 (1937).

[28] This series will include such topics as corporate practice, brief-writing, drawing leases, preparing contracts, collecting claims, labour law practice, copyright practice, patent law, and other general practice subjects.

[29] This series will cover all the steps in civil litigation from the first interview

When these handbooks are available, lecture courses by local lawyers, judges or law teachers in the several States can readily be organised. These may be given under bar association auspices, or by State law schools, or in any other way desired in the particular State.

3. *Federal taxation.* No American lawyer can avoid the responsibility of securing and keeping up a working knowledge of the Federal tax laws. This was true before the war, and with the Federal income tax still taking large toll of even small incomes,[31] it is even more true to-day. Moreover, the tax laws of the United States are not crystallised or static. In particular, the period from 1940 to 1945 has seen extensive changes, so that a lawyer who entered the Army or Navy in 1941 or 1942 to be demobilised in 1945 or 1946 simply does not know his Federal tax law. For that matter, lawyers who have remained in practice during this period have had continually to keep up with recent statutory changes and judicial and administrative interpretations in this field.[32]

This subject, unlike State law and procedure, and even to some extent general and trial practice, does not differ from State to State.[33] A series of handbooks or a panel of lecturers suitable for Massachusetts or New York is equally suitable for Georgia or Missouri. The subject is, moreover, a practical one, and the needs of lawyers in general practice can best be met by practical handbooks written by practising tax attorneys specially for that purpose. This has been done. A series of handbooks on Fundamentals of Federal Taxation, already published and now undergoing revision, meets the need for a first course[34]; a series on Current Problems in Federal Taxation, now almost completed, gives a more advanced treatment.[35] Lecture courses based on these handbooks are now being given

with the client to final judgment in Court. The editor for this series is Harry Sabbath Bodin, Esq., of the New York Bar.

30 The general editor for both series is Dean Roscoe Pound, University Professor in Harvard University, and formerly Dean and Carter Professor of Jurisprudence in the Harvard Law School, and for many years engaged in active practice in the State of Nebraska as well as an Appellate Judge in that State.

31 The toll is moderate enough, however, by English standards.

32 This is evidenced by the fact that some 14,000 American lawyers have subscribed to the Practising Law Institute's handbooks on Federal taxation.

33 To a certain extent, Federal taxation may be affected by the State law, as in the so-called 'community property States', but this is the exception.

34 The editor of this series is Professor Erwin N. Griswold of the Harvard Law School.

35 The editorial committee for this series consists of Professor Griswold; Roswell Magill, Esq., formerly Professor of Law at the Law School of Columbia University and Under Secretary of the Treasury; Harold P. Seligson, Esq., director of the Practising Law Institute; and Weston Vernon, Jr., Esq., vice-chairman of the Section of Taxation of the American Bar Association.

wherever desired by bar associations throughout the United States,[36] and serve the needs not only of veterans and of lawyers who have been away from private practice in Government service during the war years, but also those of lawyers whose practice has not been interrupted but who must keep up with current developments in Federal tax law.

4. *Significant developments in the law during the war years.* In the United States, as in England, the war years have seen important changes in the law. Some of these have been purely war-time phenomena, like man-power control and much of rationing; others have been of permanent significance. This has been particularly true in the fields of Administrative Law and Labour Law, but no subject in the *Corpus Juris* has stood wholly still. Some of these developments have been statutory, some have been in the fields of constitutional law, some have taken place in the classical common law fields. There has not been in the United States anything comparable to the *Annual Survey of English Law* to give a summary view of these devolopments, although such an annual survey is now promised.[37]

The real need from the standpoint of the lawyer veteran is a review of significant developments in the law since 1940, written by the leading scholars in each legal field, following the general lines of articles on the progress of the law in various subjects which have from time to time appeared in American legal periodicals.[38] Such a volume is now in preparation under the editorial supervision of a committee of the Association of American Law Schools,[39] and will appear early in 1946.[40]

These volumes, when they appear, will be suitable for use either for individual study, or for instruction by extension methods, or for use in connection with lectures on State law and procedure as forming a background for the local law.[41]

[36] Such courses are now in progress in Atlanta, Ga., Boston, Mass., and St. Louis, Mo., and are about to begin in Atlantic City, N.J., Dallas, Tex., and Los Angeles, Calif.

[37] An *Annual Survey of American Law* for each of the years 1942, 1943 and 1944, is about to appear under the imprimatur of the Law School of New York University, having been prepared by members of the faculty of that institution.

[38] The earliest article of this sort appears to have been Pound, *Progress of the Law, 1918–1919—Equity*, 33 Harv.L.Rev. 420 (1920). The Semi-centennial volume of the Harvard Law Review contained a series of fifty-year reviews of various subjects. See, for example, my *Fifty Years of American Equity*, 50 Harv.L.Rev. 171 (1936).

[39] The chairman of this committee and editor of the collection is Dean F. D. G. Ribble, of the Department of Law of the University of Virginia.

[40] The volume is being published for the Association of American Law Schools by the Practising Law Institute.

[41] In addition, there is need for special and more elaborate surveys of particularly

V

This plan of refresher studies, if pursued to its conclusion, should prepare any lawyer veteran who has had a reasonably good law school education to undertake the practice of his profession with some degree of confidence. He (or she) will no longer feel rusty, or ill at ease with the law. The question remains—How is this plan to be carried out practically?

There are three groups of students to be considered. First, there are those who are employed or practising for themselves in the larger cities. These can be best aided by night lecture courses and clinics of the sort already described. Second, there are lawyer veterans not yet employed or practising who can come to the larger cities for short, intensive refresher courses. These can be best aided by the same type of instruction, but preferably given several hours a day and in day classes. Third, there are the lawyer veterans who have resumed practice in the smaller communities or who, although not yet re-established in practice, are unable for financial or family reasons to attend refresher courses given in the larger cities. This last group is the most numerous, since the typical lawyer in the United States as a whole is still not the corporation lawyer of Wall Street but the country lawyer of the Middle West, South and West.[42]

The problem of refresher courses for lawyers who cannot attend lectures in the larger cities can be solved to some extent by the development of extension instruction. Correspondence teaching of law has heretofore been held in very low esteem in the United States. During the war, such instruction in other subjects was effectively developed by the Armed Forces Institute, but the teaching of law to men and women in the services was not attempted, as it was, and very successfully, by the law schools of Australia and New Zealand.[43] But it must now be attempted, and there is no reason why the attempt should not be successful.

To be sure, some legal subjects lend themselves better than others to extension teaching. Federal taxation, particularly, should be an easy subject to deal with effectively in this way. The same thing may be said of those aspects of general practice

active fields of legal development, such as Administrative Law, Constitutional Law and Labour Law.

[42] See note 8, *supra*.

[43] Communicated by Lt.-Col. Julius Stone, Challis Professor of International Law and Jurisprudence in the University of Sydney, Australia, sometime Dean of the Faculty of Law of the University of Auckland, New Zealand.

which involve mainly paperwork, such as the drawing of contracts, leases, incorporation papers, and the like. It will be more difficult to teach trial practice in this way, but even here preparation for trial, the drawing of pleadings and motion papers, and the drafting of other documents incident to trial should be readily teachable by extension methods, while even correspondence instruction in how to examine a witness may well be preferable to no instruction at all.

There is still another possibilty. The very aspects of trial practice most difficult to teach by correspondence should be easy to teach by educational films. These were used with great success by the American Army and Navy, even in the legal subjects [44], and yet the development of audiovisual instructional aids, although greatly advanced during the war, is still in its initial stages. The whole matter of using sound films in professional education is now being actively explored in the United States, and it is to be hoped that funds can be found to finance a really significant programme in the field of legal education.[45] If this can be done in time, the task of bringing effective refresher instruction to lawyer veterans outside the big cities will have been largely solved.

VI

The educational programme which has been outlined in this article will be financed mainly under the provisions of the Servicemen's Readjustment Act of 1944 [46] as amended,[47] commonly known as the G.I. Bill of Rights.[48] The significant features of this Act for present purposes are contained in Title II, which provides for payment by the United States Veterans' Administration of tuition for short, intensive courses of less than thirty weeks' duration and for correspondence courses, on the basis of contracts made by the Administrator, with approved educational institutions on such terms as shall be reasonable and fair. While the Act may be deemed defective in not providing adequate subsistence and travel allowances for

[44] Special reference may be made to the Army films on 'Courts Martial' and 'The Articles of War'.

[45] The principal difficulty with development of film programmes is the cost, which may run as high as £5,000 for one thirty-minute film.

[46] Public Law No. 346, 78th Congress, 2nd Session, approved June 22, 1944.

[47] By Public Law No. 268, 79th Congress, 1st Session, approved December 28, 1945.

[48] This legislation relates to numerous matters other than veterans' education, as for example, hospitalisation and claims (Title I), home, farm and business loans to veterans (Title III), employment of veterans (Title IV), and unemployment allowances (Title VI).

veterans taking short refresher courses at a distance from their homes, and in not permitting payment for books for home study without formal instruction in residence or by correspondence,[49] it will permit reasonably adequate refresher instruction not only for lawyer veterans but for all men and women who have served in the armed forces, and who desire to return to their former professions or vocations. The problem of the American bar now is to make the requisite educational opportunities generally available to lawyer veterans. This can be done, and can be done only, by the whole-hearted voluntary co-operation of the bar and law schools in implementing the national plan which the American Bar Association is sponsoring, and which the Practising Law Institute is seeking to administer.

The organisation of adequate educational facilities for returning lawyer veterans is the responsibility of the bar, just as the payment for such educational opportunities is the responsibility of the Government. The men and women who have fought for us on the land, on the sea and in the air, are entitled to this aid in their rapid and effective re-establishment in the profession from which they have been absent awhile to serve their country in its hour of need. The American bar is endeavouring to discharge its responsibility to its war veterans in a manner worthy of a great profession.

Sidney Post Simpson.*

[49] See my testimony before the Senate Sub-committee on Veterans' Legislation on behalf of the Section of Legal Education of the American Bar Association, the National Lawyers' Guild, the American Medical Association and the American Institute of Accountants, October 9, 1945, reported in *Hearings before a Sub-committee of the Committee on Finance, U. S. Senate, on H. R. 3749* (1945) 134–148.

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LAW-MAKING IN WHITEHALL

No subject has so much engaged the attention of English lawyers, both the jurists and the practical variety, during the past generation as that of the relationship of the newly fashioned executive towards the Legislature on the one hand and the Courts on the other. Judges have thundered from the bench against the ' advancing tide of bureaucracy ', and one of them, no less than a Lord Chief Justice, has descended into the arena where his efforts redounded so little to his credit [1] that one was tempted to renew allegiance to the old rule that judges should not write books about law. Several of the most-discussed volumes of the inter-war years dealt with this topic, which has become even more burning during the years of the war.

The complexion of English Constitutional Law has been very much coloured by the events of the seventeenth century when the legislature triumphed over the executive which then had the judiciary very much in its pocket. This triumph was not, of course, really a triumph of the legislature but of those social forces, surgent in the mercantile community and its allies, which were then expressing themselves through the legislature. During the following century this class, in co-operation with the great Whig landowners, was able to achieve a remarkable series of successes against foreign powers ostensibly much better equipped in the sphere of government. Remarkable because the classes triumphant in this political and social revolution did not trouble to build up any effective organ of government; contenting themselves with a quasi-independent judiciary largely drawn from their own ranks, and with a rule of thumb governmental machine which nevertheless produced a number of administrators of first-class calibre.[2]

It was possible for a land-owning and mercantile community desiring as little government as possible in the countries where they held sway, and even less on the high seas over which they drew their business, to rub along in this way, though the penalty was paid in such unsuccessful wars as that of American Independence. With the coming of the Industrial Revolution, however, things changed, and though the theory of *laissez-faire*

[1] See *The New Despotism*, by Lord Hewart, 1929.
[2] See *The Structure of Politics at the Accession of George III*, by L. B. Namier.

which was the formulation by a fine thinker of the unconscious philosophy of the mercantile classes was pushed almost to its theoretical limits during the industrial period, the rapidly altering economic and social conditions, and the very needs of the new industrial classes, fast becoming dominant, called almost at once for a much more highly elaborated form of government. The result was the creation of a large number of new departments of State, and, what was of even greater importance, the growth of an entirely new Civil Service.

All this was largely empirical, but while the new governing class in Whitehall was finding its feet, the new social philosophy of industrial England, of which Fabianism may perhaps be taken as a typical leftist example, was beginning to oust *laissez-faire*, and it eventually lingered on only in the dim recesses of the universities. By the turn of the century the Civil Service had awakened to the needs of the new situation, and particularly for a much more powerful and flexible machinery of government; and the public had begun to feel the influence of the new philosophy. The result was the great Liberal administration of 1906–14, which was indeed but a prelude to an era of strong government.

Even in the high summer period of *laissez-faire* a sturdy experimental start with a positive social policy had been made,[3] and something of the necessary executive power had been placed in the hands of the Civil Service. As the technique became better understood the stream of legislation increased in volume, and the powers correlative to it were bestowed upon Whitehall. The requirements of modern war brought out the essential structure of the modern State, which is nothing if not dynamic. From that time there has been no question as to the dominance of the executive in the set-up of present-day England.

This, of course, entailed a diminution in the power and importance of the legislature. Under the earlier system it had been able to give directions to the executive in some detail, but the new executive found that it could not effectively accomplish its task under these conditions, just as had the new monarchy of the Tudors. In order to carry out the new social policy, which it must always be remembered was not the invention of the executive but the demand of the people, it required an elastic authority which would enable it to mould its performances to the working requirements of the policy. The simplest

[3] See H. L. Beale's Hobhouse Lecture, 1945.

solution would have been for the officials concerned to have just got on with the job by doing whatever was needful. Quite apart from the fact that there are obvious dangers in such a course of conduct, the constitutional theory of the dominance of the legislature prevented its implementation, and recourse had to be had to what is called delegated legislation. Under this, as is well known, the legislature sanctions the general scheme of some social programme, prepared by the executive beforehand, and delegates to the department concerned power to take such further legislative action as the requirements of the situation demand. In this way the executive has attained what in reality amounts to wide legislative power, and the theory that the Legislature is dominant has become almost a legal fiction. The American political scientist James Burnham has described the sovereignty of Parliament in England as ' a lingering remnant '[4]; no doubt an exaggerated estimate, but much nearer the truth than the orthodox view. The value of Parliament in the modern world, which is certainly great, is to be found in other directions.

Meanwhile, the legal profession had constructed a formal version of the historical process above described, in which the whole slant is very naturally at a legislative angle. In this picture the high light is the rule of law, depending upon a properly constituted legislature, an independent judiciary, and an executive occupied in the background with a number of essential routine tasks such as arranging for police, armed forces, and the raising of revenue, all under the dominance of the legislature and the control of the Courts. During the eighteenth and into the nineteenth centuries this pretty picture bore some relation to the facts, and during this period it became a sort of ikon to be duly worshipped at all gatherings of lawyers.

That this religion is no longer suitable to the times became clear during the inter-war period to the more acute observers, among whom may be mentioned particularly Dr. W. A. Robson and Mr. W. I. Jennings. Others, such as the late Lord Hewart, began to get that angry, exasperated feeling which comes to the devout when they begin to feel the ground slipping from under their feet. Among the most eminent of this school is Dr. C. K. Allen, formerly Professor of Jurisprudence at Oxford, the home of lost causes. He has for a number of years past been fighting the battle of the classical jurisprudence

[4] See his *Managerial Revolution* (Penguin ed.), p. 128.

in articles, in letters to the *Times*, and in books, notably in *Bureaucracy Triumphant*. His latest and most weighty contribution to the controversy has recently been published and merits careful attention.[5]

The book purports to be 'an inquiry into the nature and scope of delegated legislation and executive powers in England'. Despite Sir Cecil Carr's valuable 'Delegated Legislation' an inquiry of this kind would be very valuable. The trouble about Dr. Allen's book is that it is so thoroughly polemical. The author hates the whole business of legislation by order; fears and despises the 'triumphant bureaucracy'; and venerates the imaginary constitution which Dicey wishfully thought into the pages of his most famous book. This being so, he is no more capable of prosecuting the needful inquiry with impartiality than was, shall we say, Pio Nono of writing an unbiased life of Martin Luther. Dr. Allen is a brilliant controversialist, rejoicing in a witty, lively prose; one reads all that he writes with pleasure, and with profit, too, if one remembers to keep one's head above the waves of eloquent denunciation.

As a controversialist, Dr. Allen's weakness is that he has not got his case clear in his mind before he starts to argue. Up to a point he is aware of what is going on in society; and certainly he realises, and emphasises, that under war conditions vastly increased power must be conferred upon the executive if wars are to be successfully fought. He is therefore a much acuter observer of the contemporary scene than was Lord Hewart. But while he knows that *laissez-faire* is dead he cannot bring himself to bury the body. Much of the argument is accordingly directed against the whole theory of modern government, but a great deal of it admits that such government has come to stay, and concerns itself with how to make it more liberal and less oppressive. But when, after pages of denunciation, the reader suddenly finds himself asked to believe that the author is only concerned with removing blemishes from the fair countenance of a spouse with whom, if he does not exactly adore her, he is content to live, he begins to wonder how genuine it all is.

Dr. Allen has industriously collected for many years past all the examples of badly drafted orders and regulations he could find, all the niggling rules which look so silly if one has no practical acquaintance with the business with which they are concerned, all the examples of official high-handedness which

[5] *Law and Orders*. 1945. London. Stevens. 385 pp. 15s. net.

he has come across. He has treasured them all up with care and not a little glee, and having got a good-sized ammunition dump together he has seized his musket and marched into the fray. He has indeed succeeded in collecting rather a terrifying assembly of bogeys.

The trouble is, that nobody reading this book without some acquaintance with the facts of the matter could possibly appreciate that there are any competently drafted orders, that any regulations have ever been passed which achieved a sensible or, indeed, a necessary objective, and that any government official had ever acted other than in a high-handed and oppressive manner. Indeed, if the picture which is painted in the book were in any real degree representative of the actual state of affairs the governmental machine would long ago have broken down from top-heavy inefficiency; if it had not before that been swept away by a revolution of the outraged and ill-treated citizens, a consummation for which Dr. Allen no doubt prays every day.

But, on reflection, it must be obvious that among the thousands of orders emanating from Whitehall every year some must be open to very serious criticism, especially when produced under the pressing urgency of war conditions, very often by amateur officials 'enlisted for the duration', and in the course of, often groping, attempts to discover what is the best way of handling an exceedingly complex situation. Constructive criticism directed to the improvement of the present position will, I am sure, be welcomed in Whitehall; and Dr. Allen is not without his constructive paragraphs, though they form but a small section of the whole book.

Dr. Allen lays the philosophic basis of his inquiry in his first chapter, entitled 'The Balance of Powers'. Here he founds himself on a 'true' appreciation of Montesquieu, who favoured a 'balance' not a 'separation' of powers between the three elements in the State. When the balance is upset liberty is in a bad way, and if one element monopolises power it is 'lost irretrievably'. According to this theory, when the legislature was dominant liberty should have declined, but actually it increased. Of course the division of powers is, or should be, purely a matter of convenience in a unitary State. Power is there, one and indivisible, and will be allocated in the way which best suits the interest or convenience of the dominant class or groups in society. The experiment with a fixed system of checks and balances in the U.S.A. was due much more to the

need for achieving a *modus vivendi* between the various aggressive and fairly evenly balanced interests then contending for power than to a veneration for a misunderstood British constitution or for the philosophy of Montesquieu, as has sometimes been supposed. It does, however, show the danger of attempting to confine power in watertight compartments.

Dr. Allen's view is that the executive is in danger of securing a monopoly of power, and if it succeeds liberty is lost; his book is, in a sense, concerned with showing how the executive is going about the job of winning this monopoly, with the author as Cassandra. And yet he realises that new conditions require greater power in the executive. His attitude is well exemplified in his statement that ' it cannot be denied, and it need not be denied, that in our system of government the accumulated experience of the executive may have a considerable influence on the shape, if not the actual conception, of legislative policy '. This shows that he is aware of what is going on, but cannot bring himself to look at it squarely. The truth is, of course, as I have already stated, that both the conception and the shape of almost all present-day legislation originates in the departments. In a very wide sense the conception originates with the party programmes on which elections are fought, and which reflect the half-conscious desires of large masses of citizens. But in no real sense do they originate with Parliament. Again, ' the judge has no end to serve except the general dispensation of justice '—statements of this kind made in 1945 make one feel like being rude, they are so very unrealistic.

Having established his point of view Dr. Allen gives us a short history of delegation. The major part of this is concerned with very modern times, and much of it is taken up with the jeremiads of the judges; a quotation will show its spirit: ' In a series of cases, most of which were painful *sequelæ* of the war, the Crown showed a recalcitrance which can only be described as a denial of justice '.

Two chapters entitled ' The Powers That Be ' are concerned with the existing types of delegated legislation, the method of operation and the control of Parliament, *i.e.*, with the legislative power on the one hand, and with the judicial powers on the other, the bodies which exercise them, and how these are controlled, up to a point, by the Courts. Here Dr. Allen is at his best. The build-up of the delegation system has been purely empirical, lack of logic is too painfully evident in many

cases, and a searching analysis brings many weak points to light. Our author is well endowed with the entire apparatus required for the handling of the material, and his lightness of touch brings gaiety to a region otherwise full of gloom. We may, perhaps, be permitted a quotation :—

> He will learn, for example, that it is an offence to play a mouth-organ (' operate any noisy instrument '), or sing exuberantly to the annoyance of less light-hearted passengers, or attach a streamer, balloon or flag to the vehicle, or in an uncontrollable excess of philanthropy, throw coins to be scrambled for by the populace on the footway. And it is not only these improbable kinds of indecorum which may lead to a summons; it would seem that he is equally a criminal if he gives a fellow-passenger a tract (' distribute printed or similar matter of any description '). How fortunate that so few citizens are tempted to these vagaries of misbehaviour.

Among the good points made by Dr. Allen in this part of the discussion is the tendency to evade the ' quarantine ' (the period during which rules have to be laid on the table of the House) by making use of the urgency procedure under which the laying may be dispensed with, and the anomalous position under which statutory rules which have to be published may be amended by ' Provisional Rules which are not necessarily published at all, and may wait a long time for confirmation '. The analysis of the various forms of Parliamentary control is searching, and the illogicality of the present position, under which the type of control exercised seems to depend on the whim of the draftsman, is demonstrated. Dr. Allen thinks that the only satisfactory form of control is by affirmative resolution of the House. This would obviously have the effect of slowing down the whole process, which is no doubt why he advocates it, but unless some new procedure were devised, such as affirmation by a special rules committee, it would obviously be impracticable.

In his chapters on Parliament and the Executive Dr. Allen gets to the heart of his subject. From his point of view the recent history is one long story of betrayal of ancient rights and surrender of privileges. Nevertheless, he should take heart, since he is able to report some successes. The censure passed by the Donoughmore Committee on the well-known ' Henry VIII clause ' has resulted in this clause being virtually dropped from subsequent bills.

Dr. Allen is much exercised by the growing habit of sub-delegation, under which he thinks that responsibility is lost and control rendered more difficult. It must be obvious, however, that in any large department the Minister is only the legislating authority in name, and provided he remains responsible to Parliament it is of very little importance from the point of view of safeguards, and of great convenience from the point of view of administration, to provide him with reasonable powers of sub-delegation. He is on safer ground when he enters a caveat against the growing tendency to give power to a Minister to make such regulations ' as he thinks fit '.

Dr. Allen makes great play with the failure in the Home Office to lay the National Fire Service Regulations before Parliament; an omission which led to the appearance of the Home Secretary before Parliament in a white sheet, and to the Act of Indemnity of 1944. He thinks that this indemnity was entirely unnecessary, as it is difficult to see how any aggrieved fireman could have had a cause of action against the Home Secretary for anything done against him under the unlaid regulations. However, it gave Parliament the opportunity, if it had so desired, of forcing the resignation of the errant Minister, and of debating the matter.

Dr. Allen seems to think that with a reformed procedure Parliament could return to the nineteenth century practice of enacting legislation with all necessary detail included. He objects to the enactment of laws in the form of broad principles with details left to be worked out in the departments. I have already endeavoured to show that this is under present-day conditions an entirely unrealistic view of the legislative process. The need for a reformed procedure is only too evident. It should be used, however, to give Parliament a more effective supervisory control, and to make it a better institution for the ventilation of the numerous cases which are bound to occur of pinching shoes and even of injustices.

The Report of the Select Committee on Procedure on Public Business, and more particularly the evidence given before it, brings Dr. Allen up sharp against the present situation, and it is remarkable that after quoting so many eminent authorities as to the realities of the modern relationship of Parliament and executive, he should still retain his old-fashioned faith. These pages, particularly 128–131, show how very disturbed in his views our author has become, and his adjuration to the people of England ' not to live in a world of compromise and fiction '

might almost be an exhortation from the author's conscious to his subconscious mind.

'The Judiciary and the Executive' provides a useful analysis of the more important recent cases, starting with the *Institute of Patent Agents* v. *Lockwood*, [1894] A.C. 347, in his discussion of which case Dr. Allen adopts Sir Graham Harrison's criticism of Lord Herschell's celebrated construction of the words 'as if enacted in this Act'. Much of what he says in this chapter is based on the recommendations of the Donoughmore Committee, and will meet with general acceptance. Everyone admits, not least the Civil Service, that the present type of judicial control is of very little value, and it is to be hoped that under a new and more energetic government steps will be taken to implement the recommendations of that strong committee.

I am disposed, however, to cross swords with a section headed 'Vicarious Legislation', in which Dr. Allen roundly condemns the recent innovation (cf. the Catering Wages Act, 1943, s. 13) under which Ministers are given power to bring proceedings on behalf of individual citizens whose rights have been infringed under some statute which it is the duty of the Minister in question to administer. A similar proposal was made in the Beveridge Report in connection with the recovery of workmen's compensation, where, however, it involves nothing more than an extension of the well-known insurance doctrine of subrogation. There is a great deal to be said for the provision of new facilities of this kind; in the stronger trade unions they have long been one of the chief benefits of membership. Another advantage is that of getting difficult points of law decided after adequate argument. No one realises so acutely as the civil servant administering a new statute the inconvenience of the doubtful point which, left to the chances of private litigation, may take years to settle. A great deal of administration is conducted on the opinions of the law officers, often expressed 'with hesitation'. Yet it will be remembered that when the departments proposed to take powers to state cases on doubtful points under the Rating and Valuation Bill, 1928, for the opinion of the Court, all the conservative lawyers rallied against the suggestion with such effect that it was dropped. One of the arguments most relied upon was that it is 'extremely difficult to give a legal opinion of any value on a purely hypothetical question'. Academic lawyers are always doing so—perhaps their opinions are not of much value—and judges frequently do so as '*obiter dicta*', such

opinions sometimes forming the basis of later legal structures. Be this as it may, the significant point is, that when the executive accepts defeat on this score and attempts to invent a method by means of which it can get doubtful points cleared up on actual concrete cases, Dr. Allen is even more suspicious and regards the move as one ' big with evil tendencies, that a man should be made a plaintiff, whether he wishes it or not, at the bidding of a departmental understrapper '.

The final chapter in the scheme of the argument is in some ways the most significant of all, because here Dr. Allen departs from the legal peg on which he has hung his earlier discussions, and attempts a broad politico-sociological survey and analysis of modern government in the light of public opinion and the needs of the citizen. He gives a picture of the modern civil servant, in many ways acute, on the whole not unfair. From this he proceeds to adumbrate a number of the common form criticisms about red tape, overlapping, etc., which come so easily from the pen of one who can take an Olympian and uninformed view. A good example is the ' hypothetical case ' of the single family applying for relief, and which in theory can come within the jurisdiction of no less than nine departments. Of course it can, and if it could not the administrative organisation would be inefficient. But perhaps this is really an example of the ' extreme difficulty of giving an opinion on a purely hypothetical case '.

Again, the Making of Civilian Clothing (Restriction) Order, 1942, comes in for scathing comment, and Dr. Allen reports with glee that ' the whole mumbo-jumbo of pockets and side pockets and sub-pockets is abandoned, for the excellent reason that it was never worth while at any time—a fact to which, I am assured, any practical tailor could have testified from the beginning '. The fact of the matter is, that the whole of this business was carried out by a Controller of Civilian Clothing, specially brought in from the business world, who is one of the most eminent leaders in the textile industry. Further, it was organised in close consultation with the trade. It may well be that on this particular aspect of the matter, quite a trivial one when viewed against the background of the great problem of keeping the civilian population adequately clothed in war-time, a problem solved in most of its difficult aspects with astonishing success, a mistake was made by the business men who were responsible for it, but it is most unfair to pick on it as if it were one of the main problems on which the Board of Trade was engaged, and was a typical example of the stupidity of

government officials. The truth is that Dr. Allen is so intent on looking for misshapen trees that not only does he ignore the straight, comely timber, but completely fails to see the wood itself.

Again, take the scornful account of the Regional Commissioners for Civil Defence (called here Controllers), of whom it is said 'it is difficult to discover that they have ever done anything except add complication and delay to public business'. Having been personally for some years one of these complicaters of public business I may not be able to reply to this diatribe with complete impartiality, but on the other hand I can speak with knowledge, the lack of which vitiates so much of Dr. Allen's book. But I express not only my own opinion, for it was also the view of almost all the local government officers who had to contend with heavy enemy air-raiding, when I say that without the mobilisation of reserves both from within and without the Region affected, the cities attacked could not have coped successfully with the enemy. Such mobilisation was only possible through a regional organisation. Civil defence was a highly complicated business, and became one requiring highly elaborated technical methods. The effective building up of this defensive system over the country would have been quite impossible without regional supervision and control on behalf of the Minister of Home Security.

This chapter is, indeed, very little concerned with the requirements of, or with the views of, or indeed with the general citizen at all. It is just a peg on which to hang a few additional criticisms of the Civil Service by eminent judges like Lord Hewart, and, of course, by Dr. Allen himself. It glides imperceptibly into a chapter on the Executive at War, with which, as will have been noticed, a good deal of it was already concerned.

Here we have a rather cursory sketch of the legislation passed for war purposes both before and during the war. But Dr. Allen's object is not so much to describe this certainly elaborate system of law, nor to examine the difficulties which it was constructed to meet, as to discover its weaknesses, to point out how it could be used to curtail the liberties of the subject, and to pour such contempt upon it as will, he no doubt hopes, create a hostile public opinion towards it. There is a rich field for his sarcasm, and by careful hand-picking of the food regulations in particular, and of some of the more foolish prosecutions under them, he is able to build up a *prima facie* case against the Ministry of Food. And yet, when one considers that the

feeding of our population during the war has been so well done that, notwithstanding shortage of supplies and much overwork and difficult travelling, the people as a whole have been better fed than ever before, and their general health has reached a standard hitherto unknown, all this legalistic pin-pricking begins to assume quite minute proportions.

Nevertheless, Dr. Allen is right to draw attention to the danger of foolish prosecutions leading to disrepute of the law. But there is an equal danger of disrepute in the picking out of these odd cases as if they were typical. There were, in fact, and naturally, tens of thousands of infractions of regulations on which the officers responsible very wisely decided not to prosecute. Indeed, the law often tended to fall into disrepute rather because of a lack of energy in prosecuting than because of a few ill-judged cases brought to Court. This whole subject is one of great legal and sociological importance, and it is a pity that the analysis is so cursory.

Indeed, almost every one of the administrative instruments by means of which the war was fought to a successful conclusion is savagely passed upon; usually after some such disarming prologue as that ' the writer is not sufficiently acquainted . . . to venture any opinion about general efficiency. . . . He does not doubt that they have done valuable work; still less does he doubt . . . extraordinary powers were necessary '.

The administration of the Essential Work Order by the National Service Officers of the Ministry of Labour and National Service, ' a minor official of a status quite unequal to the dictatorial responsibilities which are assigned to him ' is another typical example. The direction of men and women into essential war industries could only be done on an individual basis. It had to be undertaken in hundreds of thousands of cases. If Dr. Allen had paused to think the matter out he would have realised that it could only be undertaken by the local officers of the Ministry of Labour. No doubt it would have been better done by university graduates and others highly qualified, but it is in the highest degree unrealistic to suppose that with the existing demands on the highly trained intellects of the nation any such persons were available for the job. Incidentally, considering the size and complexity of the task the work was done with common-sense and judgment, and reflects high credit on the ' minor officials ' concerned.

Another example of Dr. Allen at his most critical is his discussion of the famous Regulation 18B and its administration. Again he starts by admitting the need for ' extraordinary

powers ' and then gradually works up to a white heat of indignation about the whole business of imprisoning innocent people. If extraordinary powers are given and used on a fairly large scale in the conditions of emergency which existed in 1940 there are bound to be a certain number of mistakes. It is easy enough for a judge sitting serenely in the Court of Appeal to condemn these as ' cynical carelessness ', whatever cynical carelessness may be, but the truth of the matter is that lawyers are so instinctively hostile to imprisonment without trial, and it is a good thing that they are, that they cannot bring themselves to appreciate the situations under which this sort of thing has to be done.

Most of Dr. Allen's argument is really directed against the existence of 18B at all, but he also seems to make three points in respect of its administration. First, that officials were careless. This is rested mainly on *Budd's Case*, [1942] 1 A.E.R. 749, where the order was made on ' hostile associations ', instead of associations with the British Union of Fascists, a point which would appeal to a lawyer more than to the man in the street.

Secondly, that the Home Secretary did not always accept the opinion of the Advisory Committee to which the detainee was entitled to make objections. The number of cases where the Home Secretary rejected the advice of the Committee was small, but advice is only advice, and the Minister remained responsible, and very properly exercised his own judgment. The chairmen of the Committee, which sat in several divisions, were all eminent and liberal lawyers accustomed to the common law attitude of giving a prisoner the benefit of the doubt. In the conditions of imminent invasion, with fifth columns ready to come into action, it is not to be wondered at that the Home Secretary from time to time took the view that the interests of the community required that the prisoner should not have that benefit. If he had had to accept the advice of the Committee it would have become, in reality, a Court of Appeal, not an advisory body at all.

Thirdly, Dr. Allen complains that the prisoner was not given the full details of the case against him and was denied legal representation before the Advisory Committee. He approaches the matter as if the proceedings had been a trial at law, which, of course, they were not. This is clear from his treatment of *Knight's Case*, to which he devotes a whole appendix. Mr. Knight was fortunately able to get the whole facts of his case investigated by a civil Court in a libel action, and to show

that a great deal of what on the face of it was damaging *prima facie* evidence could not stand careful judicial scrutiny. Dr. Allen suggests that the evidence on which the detention order was made was ' tittle tattle ' and it is true that Hilbery J. used that expression to describe some of it. But there were no fewer than four witnesses, scornfully described as ' a common informer, a German refugee, a typist of twenty, and a parish worker ', each of whom gave material evidence against Mr. Knight. On the face of it there was no reason why the statements of any of these witnesses should not have been accepted, and if this be granted it must be obvious to any impartial person that the Home Secretary, who, after all, cannot see and hear the witnesses cross-examined, as can a judge in Court, had no alternative but to make a detention order. The *Knight Case* affords ample proof, if any were needed, of the value of a proper judicial investigation with adequate cross-examination of witnesses, but this is *ex hypothesi* what was not possible in 18B cases.

This brings us to the point about furnishing the detainee with particulars of the case against him. It is certainly repugnant to every English lawyer and, indeed, to every English citizen, that this should not be done. Unfortunately, in the great majority of these cases, to disclose the case would mean disclosing the way the evidence was obtained on which it was built up. This is, of course, the sort of information which the enemy organisations would sell their souls to obtain, and it must therefore be obvious to any except extreme exponents of the ' *fiat justitia ruat cœlum* ' school that the case cannot be fully disclosed. In practice, the Advisory Committee exercised a wide discretion over putting the case to the detainee, and this seems to be the only sensible course in practice.

Dr. Allen is not unaware of this important consideration for he goes out of his way to attack the Intelligence Branch (Military Intelligence 5), which was largely responsible for assembling the evidence in these cases. He sneers at the lack of ' that nice sense of the value of evidence which is a distinguishing characteristic of the military mind '. Now it is not my object to embark upon the defence of M.I.5, but if Dr. Allen had taken the trouble to make inquiries he would have found that the staff of M.I.5 is very largely made up of lawyers—at least one of them has achieved high judicial office. Indeed, in spite of the fact that so many of them wear uniforms, M.I.5 is not really a military organisation at all, and is much better

described as the Security Service, a title by which it is now generally known.

One of the most interesting sections of this chapter is that in which Dr. Allen attacks the decision of the House of Lords in *Liversidge* v. *Anderson*, [1942] A.C. 406. I agree with his preference for the dissenting speech of Lord Atkin on the proper construction of the words ' reasonable cause ' in the regulation. The fact of the matter is, that when the Government agreed early in the war to amend the wording of the regulation as first issued, *viz.*, ' if satisfied . . . that it is necessary ' to ' if the Secretary of State has reasonable cause to believe ' they gave too much away. It is surely obvious that if the question of whether the Home Secretary had reasonable cause can be tested in the Courts the matter is, in effect, taken out of his hands, for every decision he takes under the regulation becomes appealable, all the evidence must be passed upon in public, and much of the emergency value of 18B is lost. Had *Liversidge* v. *Anderson* gone the other way the result would have been an amendment of the regulation so as to bring it into accord with the needs of the situation.

I took part in the agitation against the original version of Regulation 18B, but I confess that I did not envisage the conditions in which the executive had afterwards to take action on behalf of the community, and I now see that my objection to it, based on a peace-time philosophy of civil liberties, was mistaken.

The final section of Dr. Allen's argument is devoted to an able analysis of the executive's position as a litigant. Everyone who has had experience of Crown side litigation knows that the scales are in most matters of practice and procedure heavily weighted against the subject. It would, as Dr. Allen contends, be far more satisfactory if we adopted a *droit administratif* on the continental model, and gave the ordinary citizen, when in conflict with the executive, a fair run for his money. The arguments against the existing semi-mediæval state of affairs are formidably argued here, and almost everyone, including the Civil Service, would favour an enactment on the lines of the Crown Proceedings Bill, drafted as long ago as 1927. It is just witch-hunting, however, to find the reason why no legislative steps have been taken in ' a silent but powerful hostility to any change among the departments '. Such a bill would obviously be a complicated and controversial measure, and would require a great deal of parliamentary time which cannot be afforded at the expense of more pressing social legislation. That such

necessary measures are held up for so long affords further evidence of the need for drastically overhauling the legislative machinery.

In his summary and conclusions Dr. Allen comes out frankly as a protagonist of *laissez-faire*; he does not think that the State can 'regulate all, or any great part of, the legitimate activities of the citizen'. Yet it is obvious that during the recent war it has done so, and with such success as to have brought the country to victory in most difficult circumstances. At the same time, the amount of regulation found necessary under war conditions goes much further than most of us feel like submitting to in peace. We should all subscribe to Dr. Allen's dictum that 'the greater good consists in the maximum of individual liberty which is compatible with the common weal'. The crux of the political and constitutional problem of the present age is concerned with fixing the boundary beyond which liberty cannot be conceded to the individual without our running the probable risk that it will be used to the detriment of the common weal, and with the making of provision for all those group and co-operative efforts which are essential to the full life of the Commonwealth, but which cannot be attained without some sacrifice of individual liberty. If Dr. Allen had faced this problem frankly he would have written a better book.

Chorley.

SOME ASPECTS OF THE LAW OF LANDLORD AND TENANT

One of the most important branches of the law is that relating to landlord and tenant. Its social effects are very great, seeing that a very large proportion of the population is directly or indirectly affected. Out of more than nine million dwelling-houses in England and Wales it would be a safe estimate to say that more than two-thirds are not occupied by their owners and are let to tenants. In addition, another considerable proportion of the population is concerned either as landlords or tenants of industrial premises.

In view of this, it is particularly desirable that, in so far as it be possible, this branch of law should accord with the current views of justice and fairness.

It will be interesting to examine some parts of the law to see to what extent it fulfils the desideratum I have mentioned.

And first, as regards the right of the tenant to the quiet enjoyment of the premises.

There is no implied warranty or covenant by the landlord with the tenant on the creation of a tenancy (a) that the landlord had a good right in all respects to create the tenancy for the term and according to the tenor thereof, and (b) for quiet enjoyment against all the world, but only as regards the landlord and persons legally claiming under or in trust for him.

The following are examples of this rule :—

(a) Where the property let is in mortgage, and the mortgage deed contains a clause negativing the application of section 99 of the Law of Property Act, 1925, a lease granted without the mortgagee's consent will be void as against the mortgagee.[1]

(b) Where the landlord being himself a lessee, grants a term to an under-lessee which is longer than the residue of the term of the head lease, and the under-tenant is evicted by the superior landlord on the expiration of the term of the head lease, the under-tenant has no remedy against anyone. Thus, in *Baynes & Co.* v. *Lloyd & Sons*[2] the defendants had a term of which eight and a half years were unexpired and granted to the plaintiffs a term of ten years. On the eviction of the plaintiffs by the superior landlord it was held that the duration of

[1] *Keech* v. *Hall* (1778), 1 Doug.(K.B.) 21.
[2] [1895] 2 K.B. 610, C.A.

any implied covenant for title or quiet enjoyment was limited to the defendants' own estate.

(c) Where the landlord is possessed of a term subject to a restriction with regard to user of the premises, there is no implied covenant for quiet enjoyment which would cover lawful interruption by a person claiming under title paramount. Thus, in *Jones* v. *Lavington*,[3] the defendant let the lower part of a house to the plaintiff without disclosing that his own lease contained a restrictive covenant against using the premises for the purpose of any trade or business. The superior landlord having obtained an injunction against the plaintiff restraining him from carrying on any business the Court of Appeal held that he had no remedy. In *Crawford* v. *White City Rink* (*Newcastle-on-Tyne*), *Ltd.*,[4] the plaintiff having been approached by the managing director of the defendant company *who suggested* that a rink of which the defendant company was tenant and occupier would be suitable for dancing, as a result entered into an agreement for the tenancy of the premises, and expended large sums of money for advertising, alterations, fittings, etc. The defendant company was the tenant of the Newcastle Corporation, and under the terms of its tenancy no dancing could take place without the permission of the Corporation, which was not obtained. The plaintiff had no remedy, and it was held that, even if the plaintiff, before entering into the contract, had asked the defendant company whether the premises could be let for dancing, and had been answered in the affirmative, *it would only have been evidence as to the subject-matter of the contract*, and could not control, vary or add to the terms of the written contract.

This last case exhibits a peculiarly unsatisfactory aspect of the law, seeing that even if a prospective tenant makes inquiries of his prospective landlord regarding his capacity to grant a proposed lease, he is no better protected than if he had done nothing.

The absence of an implied covenant that the landlord has a good right to create the tenancy according to the term and the tenor thereof is illogical, seeing that the assignor of a lease assigning as beneficial owner impliedly covenants that 'the lease or grant creating the term or estate for which the land is conveyed is, at the time of the conveyance, a good, valid

[3] [1903] 1 K.B. 253.
[4] (1913), 29 T.L.R. 318.

and subsisting lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and has in no wise become void or voidable '.[5]

It would create no technical difficulty if, in all contracts for tenancy, whether written or not, notwithstanding any agreement to the contrary, there were implied (1) a condition that the landlord had a good right to create the tenancy for the term and upon the conditions thereof, and (2) a covenant, as at present, for quiet enjoyment, free from disturbance by the landlord or any person claiming under or in trust for him, with the addition of the words ' or by title paramount '.

It is difficult to see what objections could exist to a proposal which is in accordance with our present standards of fairness and justice.

Secondly, apart from the Housing Act, 1936, and apart from any special arrangements, there is no implied warranty by the landlord that property (not being a furnished house or flat) demised or let to a tenant is fit for habitation or use. He is under no obligation to give a proposed tenant information regarding the state of repair of such premises, nor to disclose defects rendering the property dangerous, even though he is aware of their existence or created them himself.

Probably the most flagrant example of this rule is the case of *Davis* v. *Foots*,[6] in which the facts were as follows: The plaintiff agreed to hire a flat from August 28 from the defendants, who owned the flat and had lived there. The female defendant asked the plaintiff whether she would like to have a gas fire which was in one of the bedrooms. The plaintiff said she would not require it, and the female defendant then said that she would have it taken out. The defendant's son, on August 26, removed their furniture from the flat, and also disconnected the gas fire and removed it, but he did not leave any tap on the pipe from which the gas fire had been disconnected, by which gas could be prevented from escaping into the room. The plaintiff married on September 4, and her husband on the morning of that day got a representative of the gas company to turn the gas on at the meter, with the result that the gas immediately began to escape into the bedroom. The plaintiff and her husband occupied the bedroom that night, with the result that they were both asphyxiated by the gas, and the plaintiff's husband died of gas poisoning, and

[5] Law of Property Act, 1925, s. 76 (1), and Second Schedule, Part II.
[6] [1940] 1 K.B. 115.

the plaintiff became very ill but recovered. In an action by the plaintiff it was held that the defendants were not liable to the plaintiff in damages, as a landlord of an unfurnished house, in the absence of an express contract, is not liable to the tenant for defects in the house rendering it dangerous or unfit for occupation, even if he has brought about the defect itself or is aware of its existence.

An exception is created by the Housing Act, 1936; under section 2 (1) of that Act a condition with regard to repair is implied on the letting of a house at a yearly rent of not more than £40 in the County of London and of £26 elsewhere.

The effect of the very limited extent of this enactment has been reduced by judicial decision as follows:—

(1) In *Rousou* v. *Photi*[7] it was held that the word 'rent' in the Act included rates, where the latter were included in the payment of rent. As the great majority of working-class houses are let at rents which include rates, and which exceed 15s. 4½d. per week in the County of London, and 10s. per week elsewhere, the protection afforded by the Act is therefore largely illusory.

(2) Section 2 (1) of the Act (reproducing in substance sections 14 (1) and 15 (1) of the Housing, Town Planning, etc., Act, 1909, and also section 1 of the Housing Act, 1925) runs as follows:—

> In any contract for letting for human habitation a house [within the ambit of the section] . . . there shall, notwithstanding any stipulation to the contrary, be implied a condition that the house is at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord during the tenancy in all respects reasonably fit for human habitation. . . .

The re-enactment of the section in this form is unfortunate, as Reading C.J. had, in *Ryall* v. *Kidwell & Son*,[8] made it clear that the obligations under the Act of 1909 were purely contractual, and that therefore a stranger to the contract could not recover. In this case the injured person was the tenant's daughter. It is surprising that the Legislature, having regard to the result of this method of drafting, did not express the enactment in other words, which would have saved the obligation from being entangled in the mesh of the common law.

(3) Failure by the tenant to give notice of any defect which

[7] [1940] 2 K.B. 379.
[8] (1914), 3 K.B., at pp. 135 and 140; see 5 Mod.L.Rev. 266.

renders the house unfit for habitation will prevent the recovery of damages[9] unless it is latent.[10] This is so, though the Act says nothing of notice. It is due to the fact that, as stated above, the Courts have treated the relation created by the Act between the landlord and tenant as contractual.

(4) The effect of the Act has been further whittled down in cases where a building is let to a number of tenants and the lessor retains control of a common staircase. A tenant who suffers damage through the staircase being defective cannot recover, for it was decided in *Dunster* v. *Hollis*[11] that section 15 (1) of the Housing, Town Planning, etc., Act, 1909 (which, as stated above, is repeated in section 2 of the 1936 Act) did not impose on the lessor an obligation to keep the staircase in repair.

Taking an objective view, it seems illogical that a landlord should not be liable in the circumstances mentioned above, whereas the *occupier* of a building adjoining a highway is liable for damage suffered by a passer-by if the injury was caused in consequence of the disrepair of the property, whether he knew or ought to have known of the disrepair or not.[12] That is to say, under the rule enunciated in this case the obligation is absolute, though the justice of the rule is at least arguable, whereas in the other, where the ordinary rules of fairness require the landlord to be under a duty, he has no liability.

The opinions expressed by the House of Lords in the case of *Summers* v. *Salford Corporation*[13] may provide a means of escape from the doctrine that the obligation is one of contract, and that in order to render the landlord liable he must receive notice. It would seem that, in future, the section will be construed as creating ' a statutory obligation to repair imposed in the public interest ', and that the principle laid down in *Morgan* v. *Liverpool Corporation*[14] will be subject to reconsideration and will probably be reversed.

If the contractual element is eliminated it would seem that a person, other than a tenant, who suffers damage in consequence of the obligation to repair, would be successful in an action for damages against the landlord.

Unfortunately, it may be years before the point is settled; an example of the principle that the judiciary cannot give

[9] *Morgan* v. *Liverpool Corporation*, [1927] 2 K.B. 131, C.A.
[10] *Fisher* v. *Walters*, [1926] 2 K.B. 315.
[11] [1918] 2 K.B. 795.
[12] *Wringe* v. *Cohen*, [1940] 1 K.B. 229.
[13] [1943] 1 A.E.R. 68.
[14] [1927] 2 K.B. 131.

answers to legal questions unless it is provided with material in the form of proceedings before it, and of the consequent time-lag and capriciousness with which legal points are settled.

There seems to be no good reason why amendments in the Housing Act should not be made: by reversing the decision in *Rousou* v. *Photi*; by increasing the maximum of the rent of houses to which the Act applies so that working-class houses in general should be included; and by negativing the rule in *Dunster* v. *Hollis*.

Thirdly, a landlord is able with impunity to derogate from his grant in some respects. For example, if the tenancy is of a shop, and the landlord owns adjoining or neighbouring shops, he, unless he has expressly agreed with the tenant to the contrary, may let such shops to competitors of the tenant. And if, in fact, the landlord does agree with the tenant not to let his shops to a person carrying on the same trade, the agreement is not broken if *some* articles sold by the tenant are also sold by another tenant of the same landlord [15]; and even if the articles form an important part of the tenant's trade, if the general trade of the competitor is a different one from that of the tenant, the landlord has not broken his covenant.[16]

In *Port* v. *Griffiths* [17] a landlord let a shop for twenty-one years to a tenant, who covenanted to use it for the business of selling wool and trimmings. The landlord then let an adjoining shop to a competitor. The first tenant not unnaturally objected, but Luxmoore J. held that no restriction upon the landlord could be implied from the express restriction placed upon the tenant.

Fourthly, if a prospective landlord and a prospective tenant agree that the rates shall be paid by the tenant, as is usual in houses let by the quarter or longer, if the landlord manages (as frequently happens) to slip into the covenant or agreement to pay rates any one of the following words ' duties ' or ' outgoings ', or ' impositions ', or ' charges ', the tenant may find himself saddled with the cost of permanent improvements such as street paving charges, the cost of abating a nuisance, or of making drains in compliance with the requirements of the local authority; and it has been held that a tenant could not escape liability for bearing the cost of things (for which, by any reasonable moral standard the landlord should be liable) on the ground of the shortness of his tenancy. There are numerous

[15] *Lumley* v. *Metropolitan Railway* (1876), 34 L.T. 374.
[16] *Stuart* v. *Diplock* (1889), 43 Ch. D. 343.
[17] [1938] 1 A.E.R. 295.

cases on this point and the rule even applies to a yearly tenant.[18] This is so, even though the repairs which the tenant is to be under an obligation to do are clearly defined, or even if he is under no liability to repair at all. The unfortunate tenant has allowed himself to be entrapped and must take the consequences. Furthermore, if the rent is stated to be ' a net rent ' or ' clear of deductions ', the tenant will be liable (in the absence of express stipulation or indication to the contrary) to pay the general rate, poor rate, sewers rate, land tax and all other rates and taxes except property tax.[19]

Fifthly, the question of the responsibility for repairs is the cause of as many disputes as any in this unsatisfactory branch of the law.

In the absence of express agreement, the landlord is not liable to repair the demised premises. He is not even liable in the case of a weekly tenant whose rent has been increased under the Rent Restriction Acts for the *express purpose* of providing for the costs of repairs.[20]

It is very usual for a lease or a tenancy agreement to provide that the tenant shall be liable for interior repairs, but apart from express stipulation, the landlord is under no corresponding duty to keep the outside in repair. The result frequently is that the tenant, for his own protection, is compelled to do the outside repairs as well.

If the tenant has covenanted to repair ' fair wear and tear and damage by fire or tempest excepted ', a covenant by the landlord is not implied to make such wear and tear or damage good.[21] If demised premises are destroyed or damaged by fire or tempest or other inevitable accident, the tenant, if he has agreed to keep them in repair, in the absence of some such words as ' damage by fire or inevitable accident excepted ' is liable to make good the damage, even to the extent of completely rebuilding the premises if they are totally destroyed. And this is so even though the landlord has received insurance moneys of a policy insuring the premises.[22]

The gross injustice of this rule was brought home to me recently in a case in which I was professionally concerned. A

[18] *Francis* v. *Squire*, [1940] 1 A.E.R. 45.
[19] *Bennett* v. *Womack* (1828), 7 B.&C. 627.
[20] *Morgan* v. *Liverpool Corporation*, [1927] 2 K.B. 138, C.A.; *Wilchick* v. *Marks and Silverstone*, [1931] 1 K.B. 56.
[21] *Arden* v. *Pullen* (1842), 10 M.&W. 321; *Weigall* v. *Waters* (1795), 6 TermRep. 488.
[22] *Leeds* v. *Cheeham* (1827), 1 Sim. 146.

limited company took a lease of business premises at a considerable rent, one of the directors guaranteeing payment of the rent and the performance of the covenants. The lease, which contained the usual clause for the abatement of rent in case of accidental fire and a repairing covenant, was perused on behalf of the company and the guarantor by a solicitor, who omitted to insist that this covenant should be qualified by the words ' damage by fire excepted '. The premises were destroyed by accidental fire, with the result that though the rent was suspended in consequence of the fire, it only was suspended until the property was fit for occupation, and that under the unqualified covenant to repair the company was liable to rebuild, and not having done so, in spite of the fact that building was impossible owing to the prohibition by the Government (the company having gone into voluntary liquidation), my client became liable for the rent reserved by the lease for the remainder of the term, the liability running into over £10,000.

The landlord was insured against fire and received the insurance moneys. He sued the guarantor and obtained judgment. The guarantor filed his petition in bankruptcy, the landlord being his only creditor.

Sixthly, the tenant is liable to continue to pay rent, although the premises are destroyed or damaged by fire or inevitable accident, and the tenant's covenant to repair is qualified by the words ' damage by fire or inevitable accident excepted '.[23] And the principle stated above in *Leeds* v. *Cheetham* applies to rent also.

Seventhly, even when a landlord has either expressly or impliedly agreed to repair, he will not be liable to anyone (other than the tenant) who suffers injury by reason of the property being out of repair. Thus, in *Cavalier* v. *Pope*[24] a landlord agreed with his tenant to repair a defective house, but failed to do so. The tenant's wife was injured in consequence, but it was held that she could not recover. For the relationship between the landlord and the tenant is a purely contractual one, and a third person may not benefit from such a contract. But it would have been otherwise if she had suffered the injury when in the highway adjoining the demised premises.[25]

Whatever the explanation may be, the termor under a lease or tenancy agreement has always been the poor relation of those more fortunate who were seised of a freehold estate in land.

[23] *Belfour* v. *Weston* (1786), 1 TermRep. 310; *Hare* v. *Groves* (1796), 3 Anst. 687.
[24] [1906] A.C. 428.
[25] *Wringe* v. *Cohen*, [1940] 1 K.B. 233, where the authorities are discussed.

I make no apology for referring to rules of law with which lawyers are familiar. (Familiarity frequently breeds apathy or complacency as well as contempt.) My object is to endeavour to emphasise the extremely unsatisfactory state of this branch of the law. This is aggravated by the fact that a large proportion of tenancies are evidenced by documents not prepared by solicitors, and that in the present state of the law, as I have endeavoured to show, a tenant is liable to all kinds of traps which can only be avoided by a person technically competent to do so. It is unreasonable to expect citizens to incur the expense of employing solicitors to prepare what are apparently very simple documents and, indeed, it is useless to expect them to do so. The only other practicable course is to improve the law by removing the traps and making it in accordance with current opinion.

Those who are best able to initiate legal reform are, for a variety of reasons, unlikely to be subject as tenants to the injustices arising from the present state of the law. This is unfortunate, for nothing is better calculated to bring home to a man that there is a need of a reform, than to suffer the injustice himself.

It might seem surprising, seeing how unsatisfactory the law of landlord and tenant is, that the general public have not demanded reforms in this branch of the law. I think the reason for the lack of agitation regarding this, and also regarding many other common law rules calling insistently for reform, is due to the feeling by the layman that the law, like the soldier's pay book, is incomprehensible. There is also the fact that only a relatively small percentage of the population suffer at or near the same time from the same unsatisfactory legal rule. And it is a characteristic of Englishmen to bear with remarkable patience most ills, and especially those which they do not comprehend. Indeed, there is a tendency to regard a man who resents an apparent legal injustice as one with a grievance, and such a person is never popular.

It would seem, therefore, that the work of reform must be performed by the legal profession, and it is to be regretted that so much of the energies of its members is expended in the consideration of law either in its analytical or in its historical aspect, and so little to the consideration of its sociological effects. For though the lawyer *qua* lawyer is only concerned with law in its analytical aspect, and the assessment of relative values, the balancing of social interests and the production of schemes of legislation are not his function as such, he will be

only partly fulfilling his duty as a citizen if he considers law exclusively in its analytical aspect, especially as he is in consequence of his profession better able than most to understand what legislation, whether original or amending, is requisite in order that the law may perform its function.

For law is a means to an end. Its function is to give form and order to the political, economic, social and ethical ideas current in a State by furnishing a body of rules which shall regulate satisfactorily the formal relations of the State and its citizens, and those of the citizens *inter se*. It should be, as it can be, one of the principal means of conducing to human welfare.

B. Plummer.

THE NAPOLEONIC SYSTEM OF ADMINISTRATION IN FRANCE

The many problems involved in the rebuilding of the social and political structure of France will be dealt with in due course by the French nation itself. It cannot be pretended, however, that Great Britain has no interest in the establishment of a stable, democratic form of government in France. For this reason it may be justifiable for us to examine briefly one of the more important, yet less obvious, aspects of this question. The nature and significance of the central institutions of government are easy enough to appreciate: the purpose of this paper is to suggest that the form of local government is also a matter of major importance.

The centralised administrative system which has prevailed in France was the work of the Revolution and Napoleon. Centralisation itself preceded the Revolution, which began with a spontaneous movement all over France for the establishment of local self-government. The National Assembly, alarmed at the prospect of the country falling under the control of thousands of little municipalities, but unwilling to perpetuate the *ancien régime* traditions of the provinces and *généralités*, attempted to canalise this movement by dividing France into *départements*. Successive revolutionary Governments found it increasingly necessary to forestall possible opposition by depriving both *communes* and *départements* of the machinery of free self-expression. Finally, Napoleon eliminated the elective principle completely, and substituted for it the authority of nominated *préfets*, *sous-préfets* and *maires*.

The machinery of administration thus created was too favourable to the powers of the State to be willingly sacrificed by any of the régimes that followed during the nineteenth century. In opposition, both republicans and monarchists might flirt with the idea of decentralisation, in power they upheld the centralised system of government. The reason for this is plain. Fundamentally it was not the administrative merits of centralisation that ensured its preservation, but its political advantages. The *préfet* was primarily the political agent of the Government. Casimir-Périer exposed the basic principle of the system in his declaration that it was not the duty of the Government to remain neutral in elections. The

Ministry is convinced, he said, that its continuance in office is vital to the interests of the nation. All Governments were of the same opinion, and the *préfet* was their chief instrument for putting it into practice. The situation was stated very clearly by a *sous-préfet* of Louis Philippe, appealing to a meeting to support the official candidate. 'My life, and that of my children', he declared, 'are in your hands. If the Ministry's candidate is not elected I shall lose my post.' The revolution of 1848 did not change the situation fundamentally, for Ledru-Rollin's *commissaires* were bitterly criticised for their attempts to influence the elections, and under Louis Napoleon the *candidature officielle* became a recognised institution. The first circulars of the Ministry of the Interior under the Third Republic proclaimed the liberty of elections, but instructed the *préfets* and *sous-préfets* to guide the electors. The failure of the MacMahon-de Broglie attempt to stifle the Republic at birth in 1877, when seventy *préfets* and 226 *sous-préfets* were changed for the purpose of making the elections, undoubtedly dealt a severe blow to their political prestige, and after this the more blatant forms of administrative pressure were gradually dropped. But in 1911 M. Gaston Jèze could still describe the *préfet* as 'essentially an electoral agent', whose future depended on his success in influencing the elections. To succeed, he said, a *préfet* must have '*une grande souplesse, peu de scruples et de la poigne*'. Like their predecessors, he concluded, the *préfets* of the twentieth century were the great enemies of the public liberties.[1] More recent critics have found the chief evil in the political pressure exercised by senators and deputies over the *préfets*.[2] It is probably true that, especially after 1918, the political influence of the *préfets* suffered considerable diminution. The Tardieu attempt to make favourable elections by a wholesale change of *préfets* proved a failure. But the close relationship and interaction of politics and the centralised administration, however its mode of operation may have changed, remained a basic fact of the political structure of France.

During the Third Republic, however, there was one important breach with the tradition of centralisation. This was the law of 1884 providing for the election of *maires*, which has been described as '*la loi essentielle et utile de la République, celle qui mieux que toute autre a assuré son triomphe et*

[1] G. Jèze, *Du rôle des préfets en France*, *Revue du droit publique*, 1911, t. 28.
[2] R. Maspétiol et P. Laroque, *La Tutelle administrative*, 1930, p. 324.

a durée '.[3] Despite this concession, the republican parties were on the whole profoundly suspicious of the policy of decentralisation. Gambetta is alleged to have replied, in 1879, to an advocate of federal ideas, '*Monsieur, si les idées que vous venez de m'exposer avaient la moindre chance d'être écoutées, vous ne sortirez pas libre de cette chambre, et vous seriez fusillé ce soir même.*' Decentralisation was particularly feared as likely to work to the advantage of clerical influence, and the unifying Jacobin tradition was still strong among the supporters of the Republic. '*C'est la centralisation*', declared one legal textbook, '*qui porte jusqu'aux extremités du corps social cette action, partie du coeur et revenant au coeur, qui lui donne la vie. C'est la gloire, c'est la force et le salut de la France*'.[4]

The monarchists put themselves forward as the advocates of decentralisation, but how this was to be reconciled with their authoritarian principles was never satisfactorily explained, and when the Third Republic had fallen, the Vichy régime was hardly marked by an effective extension of local liberties. The regionalist movement, despite widespread support, achieved little or no legislative success. The *décret-lois* of the Poincaré Ministry of 1926 improved the functioning of the bureaucratic machine, but did not extend powers of local government. It was still on the whole true, when the Third Republic came to its end, that as Hauriou wrote in 1913, '*Notre édifice administratif a été organisé au lendemain de la Révolution en l'an VIII, par le premier consul, avec une centralisation tellement énergique qu'après un siècle de durée et plusieurs poussées successives de décentralisation, il reste encore très fortement centralisé*'.[5] The administrative history of France, from 1789 to 1939, can thus justifiably be regarded as a unity. Can we draw any conclusions from this history?

The first point to note is that a system which has lasted so long, and through so many vicissitudes of government, must be deeply rooted in the political habits of the nation. Nevertheless, after 1871 there was a slow extension of the rights of local self-government. Those whose task it is to refashion republican institutions in France will have the choice between continuing and developing this tendency, or relying on the traditional methods. What is the case for centralisation? It rests on the furtherance of three main objects—economic improvement,

[3] A. Thibaudet, *Les idées politiques de la France*, 1932, p. 53.
[4] Trolley, *Cours de droit administratif*, I. 89.
[5] M. Hauriou, *Précis de Droit administratif*, 8th ed. 1914, p. 63.

administrative efficiency and political stability. The question we have to ask is whether centralisation has in fact promoted these three aims in the past, and is likely to promote them in the future?

As the supervisor of the economic life of the *département*, the *préfet* was the heir of the *intendant*. The activity of such an official could achieve important results in an age when economic activities were mainly localised; but during the nineteenth century the regulation of economic life within the departmental framework steadily became more difficult, until it finally broke down during the first world war.[6] How far the economic tutelage of the State shall be extended in France is a matter for discussion, but there can be no doubt that in so far as it operates it will have to be on a national and regional basis. Economic life has clearly outgrown the departmental mould. It requires larger regional divisions, which for that very reason will not be so easily fitted into a bureaucratic system presided over by the Minister of the Interior.

From the point of view of administrative efficiency also the value of the prefectoral system has changed in the course of time. Centralised authority was exercised by hierarchical control, by the *tutelle administrative*, and by the judicial process of *recours pour excès de pouvoir*. The first of these, the specifically bureaucratic form of control, has all the characteristic defects of bureaucracy. Its effects have been described as fear of responsibility, favouritism, political interference in administration, and '*fonctionnairisme*'. It is fundamentally incompatible with any degree of effective local self-government. In fact, as soon as the first steps were taken towards decentralisation it became necessary to rely chiefly on a new form of control. This was the *tutelle administrative*, which has been defined as '*l'ensemble des pouvoirs limités accordés par la loi à une autorité supérieure sur les agents décentralisés et sur leurs actes, dans un but de protection de l'intérêt général*'.[7] This form of central control, also, has been severely criticised, as more often a hindrance than an aid to local government.[8] '*La tutelle administrative en France*', wrote Jèze, '*il faut le dire hautement, a fait faillite. Les préfets l'ont faussée en se servant de leurs pouvoirs de tutelle pour tracasser leurs adver-*

[6] Cf. H. Hauser, *L'organization gouvernementale française pendant la guerre: le problème du régionalisme*, 1924.
[7] Maspétiol et Laroque, p. 10.
[8] *E.g.*, H. Berthélemy, *Les réformes administratives et judiciaires de 1926*, 1928. p. 34. M. Dendias, *Le gouvernement local*, 1930, p. 113.

saires et pour favoriser leurs amis politiques.'[9] Its effectiveness gradually declined, and by 1926 it could even be claimed that it hardly existed except as a theory in text-books of administrative law.[10] Finally, we have the *recours pour excès de pouvoir*. The disadvantage here is the slowness, as well as the unsuitability, of judicial procedure for dealing with administrative problems. From the point of view of administrative efficiency, therefore, centralisation in France seems to be justly open to much of the severe criticism that has been directed against it. It is necessary to ask if any of these methods of control is capable of improvement, or whether the solution may not be to leave more independence of action to decentralised, democratic authorities in all those fields in which direct national administration is not necessary.

The third claim that has been made on behalf of centralisation is that it is needed for political stability. The history of France during the last century and a half hardly suggests that, if this were the object, it was successfully achieved, and we must ask whether the prefectoral system on the whole served to check or to promote the series of revolutionary changes of régime. It is clear that while a Government remained in the saddle its powers were greatly increased by the existence of a centralised administration. But this source of strength was also a source of danger. Protected from the impact of public opinion by a bureaucracy which naturally tended to represent conditions in the most favourable light, Bourbon, Orleanist and Bonapartist régimes in turn lost the support of the country without realising the fact. It was only necessary for a revolutionary movement to secure power in Paris for all resistance to collapse. Once the revolutionaries had obtained control of the Ministry of the Interior, the whole administration was paralysed. *Préfets* and *sous-préfets* were dismissed, sent in their resignations, or often, hopefully, their adherence. It is difficult to resist the conclusion that the centralised system of administration, while it stood in the way of timely adaptation, facilitated revolutionary changes of régime.

Our conclusion is, that in respect neither of economic and administrative efficiency, nor of political stability, can the claims of centralisation be supported in France at the present day. It is possible, of course, that a more decentralised form of government might have other and worse defects. It might

[9] Jèze, p. 280.
[10] H. Berthélemy, *Droit administratif*, 1926, p. xxvii.

not work at all. But France had considerable experience in the functioning of local elective councils during the Third Republic. In the larger towns particularly, the *maire* and *conseil municipal* had considerable powers in practice and exercised them in some cases with conspicuous success. Decentralised administration of local affairs can, of course, merely spell corruption and inefficiency, but there is no reason for supposing that such results would necessarily accompany it in France. Above all, the decisive consideration is that local self-government has as obvious links with democracy as centralisation has with authoritarian forms of government. Over a hundred years ago de Tocqueville wrote, '*C'est dans la commune que réside la force des peuples libres. Les institutions communales sont à la liberté ce que les écoles primaires sont à la science: elles la mettent à la portée du peuple; elles lui en font goûter l'usage paisible et l'habituent a s'en servir. Sans institutions communales, une nation peut se donner un gouvernement libre, mais elle n'a pas l'esprit de la liberté*'. A century of further experience has not made de Tocqueville's verdict seem any the less true. Discussion there may be, and undoubtedly will be, over the size and nature of the areas of local government. The net-work of communes, varying in size from small villages to great cities like Lyon or Marseilles, is too well-established to be capable of fundamental modification, and too successful to require it. The future of the *départements*, and the possibility of concessions to regionalist opinion, is a more open question, but it is too complex a problem to be discussed here. Our object has not been to discuss detailed reforms, but to indicate the importance of the subject, and to suggest that when a new constitution comes to be drawn up for France, if we wish to understand its spirit, and draw any conclusions as to its essential tendencies, we will do well to look, not only at the forms of central government, but also at the scope allowed to democratic institutions of local government.

Alfred Cobban.

STATUTES AND REPORTS

LEGAL AID TO THE POOR AND THE RUSHCLIFFE REPORT

In the last issue of this *Review* the present writer reported on the two schemes on legal aid to the poor submitted by Sub-Committees set up by the Conservative Party and the Labour Party.[1] While that article was being printed the report of the Committee under the chairmanship of Lord Rushcliffe, appointed by the Lord Chancellor (Lord Simon), was published and the entire problem assumed a completely new aspect.[2] The two political committees had seen most of the problems. Both had also felt a great deal of sympathy with the various proposals for reform. Yet it is clear that neither Committee had treated the subject in a manner that could be considered as approaching a convincing solution. The Rushcliffe Committee's report is of a very different character. It is a well-nigh exhaustive study of legal aid to the poor. It contains a most elaborate, and in some cases profound, discussion of the various suggestions for improvement made by recent writers and by the numerous experts heard by the Committee. Moreover, it embodies in its scheme a number of new ideas, the result of the Committee's own creative work. The Rushcliffe Committee may indeed have succeeded in giving a satisfactory answer to some of the most baffling problems of legal aid to the poor.

The Conservative Party scheme had treated legal aid in litigation with a considerable amount of understanding and sympathy, but failed to submit any suggestions for legal aid outside litigation. The Labour Party's scheme had avoided this error and devoted an equal amount of attention to both sides of the problem. But the Labour Party's Committee had confined itself to a few cursory remarks on the organisational side of the problem. Last, but not least, that Committee—like many others in the past—had failed to establish a proper connection between the organisation concerned with legal aid in litigation and that which administers legal aid outside litigation. The difficulty of establishing this connection is created by the necessity of keeping unimpaired the freedom of the profession, and at the same time securing to the independent

[1] See E. J. Cohn, 'The Political Parties and Legal Aid', in 8 MOD.L.REV. (1945), pp. 97 ff.
[2] Cmd. 6641/1945.

professional man a share in the legal aid work without, on the other hand, reducing the official legal-aid organisation to inefficiency or confining it to merely administrative work. This delicate task, it seems, has now been solved by the Rushcliffe Committee, at least to the extent to which any blue-print can solve a problem of this character.

The Rushcliffe Committee's scheme provides for a chain of legal advice bureaux of varying forms, permanent, semi-permanent and non-permanent. Any needy person can, without a means test, obtain legal advice outside litigation at any of these centres, either on the spot or by being referred to a solicitor on the advice panel. The client will, where possible, pay 2s. 6d. to the organisation, which on its part pays 7s. 6d. to the solicitor, if any, who has given the advice. A whole-time paid solicitor is in charge of a permanent advice office. He is supported by the necessary clerical staff. Semi-permanent and non-permanent offices are conducted by part-time paid solicitors. The whole organisation is set up under the control and supervision of an Area Committee, consisting of solicitors and members of the Bar, both of whom receive remuneration for their expenses and probably also a fee for such work as they have to attend to. England and Wales are to be divided into ten areas, the administrative county of London plus Middlesex forming one such area. For each of these areas one Committee is to be set up. Each Committee will have its own Area Secretary, a permanent official, who will be assisted by the necessary clerical and other staff, including, it is assumed, experienced accountants.

The Area Committees constitute the centres of gravity of the Rushcliffe Committee's scheme. They combine in their hands the task of supervising the organisation granting legal aid outside litigation with that of appointing, and hearing appeals from, Local Committees, which decide about applications for legal aid in litigation. The Area Committees are thus responsible for the general administration of the scheme in both branches within their respective areas. Control on the central level is in the hands of the Law Society, which on its part is answerable to the Lord Chancellor, who has authority to issue rules on the details of the scheme and to allocate a block payment to cover the expenses of the machinery to the Law Society. The latter allocates the necessary funds to the individual Area Committees. The headquarters of the Area Committees constitute at the same time permanent legal advice centres, so that the Area Committee does not work in the

seclusion of a back-room administration, but is intimately connected with the actual needs and desires of the population.

The connection between legal advice outside litigation and legal aid in litigation is made even more intimate by the proviso that, where the help that is required consists of assistance in correspondence or in negotiations requiring an amount of time and labour that cannot be considered as fairly covered by the payment of 7s. 6d. to the advising solicitor, the applicant must apply for a legal aid certificate to the Local Committee. The Committee will treat such an application in the same way as an application for legal aid in litigation.

Legal aid and legal advice are no longer to be granted exclusively to ' poor persons '. The Rushcliffe Committee—like the Conservative Party Committee—suggests that the term ' poor person ' is to disappear and to be replaced by the term ' assisted person '. That is by no means a mere change of terminology. The Committee states that in its view ' legal aid should be available in all Courts and in such a manner as will enable persons in need to have access to the professional help they require '. It is clear from the report that this basic principle has been elaborated by the Committee in a way which no fair-minded observer can possibly consider as ungenerous. As far as legal aid in criminal cases goes the Committee had, of course, a comparatively easy task. The Poor Prisoners' Defence Act, 1930, leaves in theory not much to be done, except that payments for counsel and solicitor should be put on a more appropriate level, that more adequate time should be allowed to the defending solicitor or counsel to prepare the defence, that the costs of the working of the system should be borne by the taxpayer and not, as at present, by the ratepayer and—last, but not least—that the necessary publicity should be provided so that the existence of the facilities that are available becomes known to those who require them. The Committee provides for all these and some other minor improvements. There seems every ground to hope that these improvements will result in a realisation of the intentions with which the Poor Prisoners' Defence Act, 1930, was passed.

The Committee had to carry out a much more difficult task in mastering the problems of legal aid in civil litigation. As regards the question of defining the scope of ' assisted persons ' the Committee had to choose between retaining or abolishing the present system of rigid limits of income and property. The Committee says rightly that the rigid system must result in hardships and anomalies among those whose income is just near

the limit. Nevertheless the Committee did not think it right to follow the example of the Poor Prisoners' Defence Act, 1930, and of many Continental laws which leave the delimitation entirely to the free discretion of the authority granting legal aid. Instead of that, the Committee worked out a complex system of rules which are intended to solve a twofold problem. In the first instance the Committee had to say who is to be granted legal aid. In the second instance, however, the rules are intended to carry out another basic idea adopted by the Committee, the purpose of which is to put an end to the present 'hit or miss' system of legal aid. In the Committee's view there are numerous cases where a party cannot be expected to finance the entire costs of his or her case, but where the party can be expected to contribute to the costs of the proceedings. In other words, the Committee has adopted the Continental idea of 'part assistance in litigation', and combined the machinery by which it is to be put into operation, with its definition of persons capable of receiving assistance.

In this task the Committee has applied a great amount of care and shown a generosity, which—one hopes—will be shared by the legislator. Some of the ideas which the Committee has adopted have also been adopted by the New South Wales Law, No. 17 of 1943,[3] but it is obvious that the Australian legislator has been left far behind by the Rushcliffe Committee in respect of generosity and attention to detail. This may not be obvious to the casual reader. The Committee recommends that full legal aid can be granted to a single man or a woman with an income of no more than £156 and capital of no more than £25, or to married men with an income of no more than £208 and capital of no more than £50. Persons earning a higher income or possessing a larger capital can be granted legal aid in part, *i.e.*, they have to contribute to the costs of the proceedings out of their own funds. This formulation is, however, little more than a nominal concession to the rigid system. For the terms 'income' and 'property' are to be understood in a sense which differs widely from that in which these words are used in the present law of legal aid to the poor. For all purposes of the scheme 'income' and 'property' do not mean the gross amounts earned or possessed by an applicant. They mean the amounts obtained by 'adjusting' the gross amounts. The adjustment is effected in the first instance in accordance with a

[3] A summary of this law will be found in the 'Review of Legislation 1943', *Journal of Comparative Legislation*, Vol. XXVII (3rd series, 1945, Part I and II), pp. 59 ff.

number of detailed rules, partly laid down by the Committee and partly to be laid down by the Lord Chancellor as rule-making authority. In the second instance, a certain amount of discretion—to be exercised within the limits of the other rules—is left to the Assistance Board, which according to the Committee's suggestion has the final decision on the question what the ' adjusted ' income and property of an applicant is. Thus, in adjusting the income, any amount which the Assistance Board is by statute required to leave out of account is to be left out of account here. Amounts equal to the allowance which might be payable by the Assistance Board are to be deducted from the income of married men in respect of each child. Amounts paid or payable as income tax are to be deducted. Even more far-reaching are the adjustments in respect of capital. Any household effects, tools of trade, the house in which the applicant lives and under certain circumstances capital employed in his business, not excluding even a motor car genuinely required in the business, are not to be counted as part of the applicant's property. On closer inspection one begins to be a little doubtful of the value of some or even all of these rules. Clearly the Committee itself intends them to be rules of guidance rather than inflexible legal provisions. More than once the Committee points out that ' it is difficult to lay down general rules in advance ' and underlines the necessity of leaving a certain amount of free discretion to the Assistance Board. There is no room for a detailed critical investigation of these suggestions within the limits of the present note. Yet it may be said that the co-operation of the Assistance Board is perhaps the least attractive feature of the scheme. The large amount of discretion which, notwithstanding all the details provided for by the Committee, must be left to the Assistance Board increases these doubts. The Committee obviously thought that difficult computations like those which are required for the operation of its scheme could not well be left in the hands of the Local Committees. There is a great deal to be said for that. Yet the Assistance Board hardly offers those guarantees of judicial independence which one might wish to find in the authority which is entitled to open or to close the gates of justice to needy persons believed to be entitled to claim the assistance of the law. Another criticism which one might venture to adopt from the New South Wales Act of 1943 might be that the amounts of capital which are allowed might be increased to £50 and £100 or even to £100 generally. There are many cases in which the entire system of ' adjustments '

will not help because there is no ground on which such an adjustment could be justified. In such cases the present maximum limits will appear rather low, notwithstanding the fact that persons with more capital are required to contribute to the costs and not to finance the entire case themselves. On the other hand, to leave out of account the full value of the house which the applicant inhabits might result in hard cases: why should a man owning and inhabiting a £2,000 house not take up a mortgage to cover the costs of a lawsuit? The New South Wales law provides a maximum value of £750, beyond which a house may be taken into account in the computation of the applicant's property.

The amount of part contribution which persons receiving part assistance have to make is not left to the decision of the Assistance Board. It is to be determined by the Local Committee. But the Local Committee is in this respect bound by a rather mechanical rule, laid down by the Rushcliffe Committee. The contribution is one half of the difference between the maximum income allowed for full assistance (*i.e.*, £156 or £208) and the actual adjusted income of the applicant. On the other hand, the applicant has to contribute all his adjusted capital over and above the maximum limits of £25 and £50. No assistance—apart from exceptional cases—is to be granted to persons with an income of more than £420 or a capital of more than £500. It will be seen that while formally the Local Committee has jurisdiction over the amount of the contribution, the actual decision lies here too in the hands of the Assistance Board, because the result depends solely on the adjustment of the applicant's means and property which is left to the decision of the Assistance Board. Only if a change of circumstances such as an illness of some duration occurs has the Local Committee the power to review the contribution. The Committee may also permit the parties to make the contribution in instalments, though in the case of the plaintiff this should be done only in ' exceptional circumstances '. One might perhaps venture to think that this distribution of jurisdiction between the Local Committee and the Assistance Board would be capable of improvement. On the other hand, the Committee permits the Local Committee to fix a lower contribution where the actual costs of the action are not expected to reach the contribution which the applicant would have to make. It may be thought that the discretionary powers of the Local Committee might be capable of enlargement so that special circumstances prevailing

at the time when the Local Committee decides may be taken into account more fully than appears possible at present.

Nevertheless it is clear that the Committee's suggestions, if adopted by the legislator, would result in a very substantial increase in the number of assisted persons compared with the present system. Parallel with this enlargement goes the abolition of the present rule which restricts the grant of legal aid to proceedings in the High Court. The Committee has adopted the very sound principle that legal aid is to be granted in every Court in which audience is normally granted to barristers and solicitors, including, of course, the county courts. The only cases that are excepted from this rule are judgment summonses and cases of a defendant where the amount of debt is admitted and the only question is as to method of payment. Thus a controversy is, one hopes, brought to an end that should never have come into existence. The Committee makes short work of the views of one witness that the granting of legal aid could serve no useful purpose in county courts and that the judge could watch the interests of unrepresented litigants. It is the argument that Horace Twist killed in the House some 120 years ago[4]: 'Did the judge take all advantage to defeat the prosecutor and acquit the prisoner? Then, as judge, he betrayed his oath of office. Did he decline to take those advantages? Then as counsel for the prisoner he deserted his client'. What was then said of criminal law applies with equal force to civil cases. The reform recommended by the Rushcliffe Committee removes what must be considered as an unjustifiable feature of the present English law of legal aid to the poor.

Yet there can be little doubt that the Committee would not have discharged its duty of devising a working machinery for the new law of legal aid to assisted persons, if it had not also made an end to the present rule under which neither counsel nor solicitor receives any compensation for his work on behalf of the assisted person. On the contrary, things would probably become much worse if the present system of legal aid by volunteers had to serve the greatly enlarged needs of an organisation granting legal aid in all Courts. It is the merit of the Rushcliffe Committee not to have adopted a course which other laws have adopted, of which type the New South Wales Act of 1943 is the latest example. It would have been cheaper for the public

[4] *Hansard* (2nd series) XV, 610; quoted by Holdsworth, *The Movement for Reforms in the Law* (1793–1832), in 56 *Law Quarterly Review* (1940), p. 220.

chest to transfer all poor persons cases to a public solicitor, as did the New South Wales legislator, or to an organisation such as is the present Services Divorce Department. But that saving would have been made at the expense of depriving the independent profession of practically all connection with legal aid. It would have introduced into the organisation of professional representation an official and bureaucratic element, which is fortunately utterly alien to the traditions of the English legal profession. The Rushcliffe Committee has therefore been well advised to reject all those schemes and stick to the expensive, but, at the same time, the only justified course in holding that free professional men, freely chosen by the client to whom legal aid is being granted, must represent the assisted party, and that the expense of such representation has to be borne by the taxpayer. The importance of that principle is such that the details of the machinery by which it is being carried out hardly matter.

The Committee provides for various panels of barristers and solicitors specialising in the various types of work of the profession. Any member of either branch of the profession who is willing to help in legal aid to assisted persons is to place his name on one or several of these panels. By doing so he undertakes to represent any client to whom legal aid has been granted by a Local Committee or, on appeal, by an Area Committee, and who chooses him as his representative. Any expenses that are required by the solicitor in the conduct of the case are paid out by the Area Committee after details of the amount required and the reasons why it is required have been submitted. Profit costs are payable to the solicitor at the conclusion of the litigation at the rate of 85 per cent. of the taxed solicitor and client costs. Briefs to members of the bar are to be delivered unmarked. The Taxing Master will fix the fee which he would normally allow on taxation. 85 per cent. of this will be allowed to the barrister. The rate of 85 per cent. has been chosen on the assumption that 70 per cent. represents the overhead expenses of a solicitor, so that the rate of 85 per cent. represents one half of the profit normally remaining to the solicitor. Barristers, of course, have much lower overhead expenses. The rate of 85 per cent. in respect of barrister's fees seems to have been adopted with a view to using the same figure for members of the bar that is applied to solicitors, the overhead expenses of members of the bar differing so widely that they cannot even be approximately assessed. There will be hardly any doubt that the Committee has treated both

branches of the profession with the same generosity that it has shown to the assisted persons.

It would be tempting to go into further details of the scheme. The amount of labour which the Committee has bestowed upon them is proof of the seriousness with which it has treated its subject and of the importance which it has attached to it. What has been said, however, will be sufficient to show that this report is a document of first-rate significance for the entire development of English law. Its acceptance will result in a considerable proportion of all Court business being financed by the State. The Committee has seen to it that this will not mean the end of the freedom and independence of the bar. But it will be clear that, where State subvention has to keep a considerable part of the machinery of justice in operation, a new phase in the relation between the State and the law will begin. The rule-making functions of the Lord Chancellor, and his control of the complex organisation of legal aid, will probably soon result in the renewal of the demand for a Ministry of Justice. The fact that large sections of the community can conduct their lawsuits free of charge or at very small expense, will lead to demands for a revision of the system of costs and of the entire system of civil procedure which—as Mr. Claud Mullins has shown [5]—is so very largely responsible for the exorbitant costs of proceedings. Yet even more important than all this is the fact that the opening of the Courts to whole classes of the population, so far excluded from them, cannot be without influence on the future development of substantive law. Legal questions that could never be brought before the Courts will claim judicial attention. Questions that were lurking in the background will assume a new significance. Questions that appeared as minor topics of purely legal interest will be presented in their true social and economic setting. Bench and bar alike will be brought into contact with problems that have so far succeeded in escaping their attention. Those who are inclined to welcome such developments will feel grateful to the Rushcliffe Committee for the courage with which they have taken the first step on a road the end of which nobody can see. They will note with satisfaction that the Committee comprised men of all parties and of very different walks of life. That the citizen of the modern State has a right to receive legal aid seems to have become a principle upon which, happily, all are agreed. The Rushcliffe Committee's report is

[5] Mullins, *In Quest of Justice* (1930), pp. 197 ff.

proof that one can agree not only upon such general and abstract principles, but—what is much more important—about the manner of their practical realisation. For a period that is likely to bring many reforms in its wake this seems indeed a most fortunate omen.

E. J. Cohn.

INTERNATIONAL CARTELS

(*as envisaged by the White Paper Cmd. 6709*)

The solution of the problem of International Cartels and their Control has been taken an important step further by the proposals of the Secretary of State of the United States of America of December 6, 1945 ' for Consideration by an International Conference on Trade and Employment ', which the British Government has accepted as a basis for international discussion and presented to Parliament in form of a White Paper.

The White Paper is one of three White Papers embodying the results of the recent negotiations with the United States. It is the commercial counterpart of the financial agreement reached at the Conference at Bretton Woods.

The primary aims of all these agreements connected with the American loan to Britain is the economic co-operation of the peoples of the world as the foundation of an expanded trade. The White Paper with which we are here concerned envisages ' an International Trade Organisation, the members of which would undertake to conduct their international commercial policies and relations in accordance with agreed principles to be set forth in the articles of the Organisation '.

Cartels were in the past widely used as means of international collaboration. Whether or not they are desirable they will in the future play an important part in an ecomonic world of planning and organisation. No international economic charter would be complete which would not face this fact, and the functions of cartels as instruments of economic co-ordination on the one hand, and the dangers involved in the concentrated economic power of organised industrial groups on the other hand. It is, therefore, only natural that the United States' proposals should devote a great deal of attention to international (inter-governmental and private) cartels and to the problem of their control.

I

The White Paper distinguishes between *State Cartels*, termed ' Inter-governmental Commodity Arrangements ' on the one hand, and *Private Cartels*, which it ominously calls ' Restrictive Business Practices '.

Every cartel, whether between Governments or between private firms or combinations of private firms, is ' in restraint of trade '. An International Trade Organisation aiming at ' an effective expansion of world production, employment, exchange and consumption ' can tolerate cartels only as exceptional and temporary means of economic adjustments in circumstances where the solution of a particular economic problem cannot be left to the free play of competitive forces without causing widespread distress to small producers or widespread unemployment.

1. By far the greater part of the Cartel Regulations deals with *Government Cartels* for the control of production of and trade in primary commodities.

Inter-governmental commodity arrangements were the subject of previous considerations under the auspices of or by the organs of the League of Nations and the United Nations Organisation.[1]

The difficulties arising from the production of and trade in primary commodities are ' different in character from those which generally exist in the case of manufactured goods; and these difficulties, if serious, may have such widespread repercussions as to prejudice the prospect of the general policy of economic expansion '.

In order to meet such difficulties of a fundamental nature the White Paper suggests that the Governments themselves should intervene in accordance with an agreed procedure and with established rules for the institution and operation of Government Cartels.

Inter-governmental Cartels are confined to primary commodities, in contrast to fabricated goods. Members of the organisation have to submit their particular commodity problem to an investigation of their root causes by the proper study group of the organisation. The organisation will then determine, in accordance with approved procedures, whether or not

[1] Cp. Koch, *Modern Law Review* (1945), pp. 132 ff. Monetary and Economic Conference, 1933, *Report of the Bureau to the Conference*, pp. 18 ff. *Committee for the Study of the Problem of Raw Materials* (1937), Vol. II, p. 7. United Nations Conference on Food and Agriculture of 1943, as reported in *Inter-governmental Commodity Control Arrangements*, pp. xvi ff.

the orderly solution of the specific problem requires the proposed inter-governmental agreement involving the limitation of production or trade, or the allocation of markets.

The agreements must be open for access to all members, and those representing consuming countries must have the same voting power as producing ones.

In consequence of their temporary character such agreements are proposed to remain in force initially not more than five years, and they should be renewed only if during the initial period substantial progress toward a solution of the underlying problem has been accomplished, or if the renewed agreement contains revised provisions to that effect.

Full publicity is provided for any proposed or concluded agreement, its operation, and for the measures adopted to correct the underlying situation which was the cause of the agreement.

2. Outside the field of primary goods Governments are not expected to intervene by formation of cartel agreements unless the organisation finds that exceptional circumstances justify such action. The planning and organisation of economic collaboration in respect of fabricated goods is left to private initiative. The members of the organisation, however, are called upon to curb by individual and concerted efforts any *restrictive business practices* which have the effect of frustrating the objectives of the organisation.

The White Paper proposals refrain from establishing economic objectives or principles for private cartel agreements, or from laying down particular rules of procedure for determining their economic justification, as they do for Intergovernmental Arrangements. On receiving complaints about the activities of cartels from State members or, with their permission, from commercial enterprises within their jurisdiction, the organisation would call upon any member to furnish the organisation with relevant information and would, if warranted, make ' recommendations ' to the appropriate members for remedial action in accordance with their national laws and procedures. The members may or may not follow such recommendations. The organisation is empowered to request ' reports from members as to their actions in implementing such recommendations '.

It appears that the proposals are not a proper ' Cartel Convention ', the parties to which undertake to enforce the measures adopted or imposed by the International Control Authority by their national legislation and jurisdiction.

Obviously a first attempt at concerted action to control international cartels could not go as far as that without courting failure. The issue of whether a cartel is good or bad is not a legal but an economic one. It will be answered in a different way in different countries at different times. An international cartel may serve the purpose of the expansion of trade today and may restrain production, distribution and consumption tomorrow without any alteration of its purpose or practices, simply because of a change in economic conditions in one or the other country. It is not the task of the lawyer to decide economic questions, and it seems completely wrong to base decisions of that kind upon a rule of law. The experience with the American and English practice to entrust a Court of law with the decision whether a cartel is ' reasonable ' or not against ' public policy ' does anything but recommend the extension of this practice to other countries or to the international field.

The attitude of the various countries towards cartels forms part of their sovereign economic policy. None of them will be prepared to surrender its sovereign powers in that respect to an International Court of Justice deciding a most complex economic problem under a rule of law. The Governments will be anxious to retain their power to decide for themselves, on economic grounds, which would be the best way to deal with a particular cartel, under the ever-changing conditions of their national economy.

The *rule of law* in the field of international cartels must confine itself to cartel *practices*, in contrast to the purpose and effect of cartels, and will form part of the wider subject of the law on unfair competition. The decision that a cartel is, in principle, good, does not imply that it may carry out its objects by any practices which the management thinks fit to adopt. Business measures infringing the national laws against unfair competition are illegal within the jurisdiction of this particular country. It is provided that the International Trade Organisation should promote the adoption in all countries of codes of fair business practices, designed to facilitate and enlarge the flow of international trade.

The White Paper shows, however, the way to more far-reaching and more effective agreements between members. They may, by bilateral or multilateral accords, co-operate in implementing any remedial order issued by one of them within their own jurisdiction. Such plurilateral conventions may become the nucleus of an all-comprehensive international cartel convention, under which all parties to it undertake to enforce

remedial actions by an international control board within their own jurisdiction.[2]

It forms part of its sovereign rights that every country may, within its own jurisdiction, take any measures against international cartels which it thinks appropriate, even if the Organisation does not see any reason to act.

II

The International Trade Organisation will have an '*Executive Board*' of not more than eighteen members and, for the special cartel control, two commissions: the '*Commodity Commission*' and the '*Commission on Business Practices*', which are responsible to the Board and consist of experts appointed by the Board. These commissions have both important functions and powers of cartel control, such as investigating, collecting and analysing information, designating members to participate in an advisory capacity in the formulation of intergovernmental agreements, designating their chairman and secretary for commodity councils established to administer a commodity agreement, and advising the Board on recommendations to be made to members with regard to remedial actions, the establishment of a uniform national cartel policy, etc.

III

It is to be hoped that, if the Anglo-American proposals for the organisation of international trade should be adopted by the Conference in June of this year, they will in time, and on the basis of practical experience, lead to the establishment of an effective system of control of international cartels, so as to ensure that cartels will become true servants and welcome instruments of international economic organisation.

F. E. Koch.

[2] As suggested by Koch in Modern Law Review (1945), pp. 141 ff.

NOTES OF CASES

THE LIMITS OF CONSTRUCTIVE MURDER

R. v. *Jarmain*, [1945] 2 A.E.R. 613, is the case of a ' hold-up ' with fatal results. Armed with an automatic pistol, the accused went to a garage in order to commit armed robbery. He found a woman cashier, fired a shot from which she died after two days, and completed the robbery. The only evidence as to the circumstances of the killing was that of the accused. According to him, the deceased woman had refused to obey his command to hand over the money she had been counting. He had then changed over from his right to his left hand the gun, which he had been pointing at her, and had cocked it twice, thus allowing one live round to be ejected and introducing another live round into the breech. He had intended to frighten her but had not intended to fire. He had pressed the trigger inadvertently and when he had realised that he had shot the woman he had grabbed a pile of notes and run out.

Charles J. directed the jury that the accused was guilty of murder, even if his evidence was accepted, as he had caused the death of another person in the course of committing the felony of armed robbery, and the jury returned a verdict of murder.

This verdict was undoubtedly justified and the direction to the jury unobjectionable; the Court of Criminal Appeal was, therefore, bound to dismiss the appeal. But in doing so, Wrottesley J., who delivered the judgment of the Court, dealt with the argument upon which the appeal was based in a manner which deserves attention.

It had been argued that the accused would have been guilty of murder, as he had killed in the course of committing a felony of violence, if he had been inadvertent as to the result of his actions. His inadvertence, however, concerned the very act of killing itself. He had not acted voluntarily, his will did not go with the action of his finger in pressing the trigger.

This argument proceeded upon the distinction between the requirement of voluntariness and that of foresight of the consequences of an act as essentials of criminal liability. English criminal lawyers are indebted to Mr. J. W. C. Turner for his explanation of this distinction in his article on ' The Mental Element in Crimes at Common Law ' in Vol. VI of the *Cambridge Law Journal*, p. 31. In this article Mr. Turner regrets

the definition of constructive murder established by the House of Lords in *Beard's Case*, [1920] A.C. 479, because it dispensed with the requirement of foresight of death. Whatever the merits of this contention, it would seem futile to renew the attack on this decision which has been followed on several occasions. The present moment, when all available resources are needed to deal with the alleged ' crime wave ', would in any case be inopportune to plead for relaxation of the law.

Different considerations would arise, however, if it were proposed to tighten the law by abandoning the requirement of voluntariness of the acts of the accused. *Beard's Case* would provide no authority for this, and throughout Mr. Turner's discussion of the requirement of voluntariness of the prisoner's conduct it is indeed taken for granted that no serious attempt has been made to reduce modern criminal law to that primitive condition in which it would be no defence to plead—in Mr. Turner's phrase—that ' I could not help killing him '.

Apart from the unfortunate decision in *Larsonneur* (1933), 24 Cr.App.R. 74, there has only been one recent occasion to deal with the requirement of voluntariness, namely, the decision of the Divisional Court in *Kay* v. *Butterworth*, reported in *The Times* Newspaper, June 7, 1945. The Court there reversed an acquittal on a charge under sections 11 and 12 of the Road Traffic Act, 1930, where the accused had been overcome by sleep whilst driving. The decision was, however, given on the ground that the driver must have known that drowsiness was overtaking him, and that he had acted voluntarily in failing to stop and wait until he had shaken it off. Mr. Justice Humphreys, moreover, emphasised that the case was different from that of a person who, through no fault of his own, became unconscious while driving, for example, by being struck by a stone or by illness, who ought not to be liable at criminal law.

It is clear that no question of involuntariness in the sense of the example given by Mr. Justice Humphreys arose in *Beard's Case*. It had been argued there that Beard had caused the death of the deceased accidentally, as he had placed his hand over her mouth to prevent her screaming, and not with the intention to kill. It was held that this could not affect Beard's liability for murder. In *Jarmain's Case* the prosecution maintained that this ruling answered the argument raised by the defence, and this contention was adopted by the Court. Yet Beard's action was only accidental in the sense that he did not

foresee death, it was not involuntary in the sense of the illustrations given in *Kay* v. *Butterworth*, or in the sense in which Jarmain's pressing of the trigger was described as involuntary by the defence.

It would seem then that the decision in *Jarmain's Case* could not be supported by the authority of *Beard's Case*. It is submitted, however, that this did not leave the Court with the choice of extending the meaning of constructive murder so as to constitute it not only as an exception to the general requirement of *mens rea* in the sense of foresight but also as an exception to the requirement of voluntariness, or quash Jarmain's conviction on the ground of misdirection. It was possible to dispose of the argument of the defence by demonstrating its irrelevance to the facts of the case. In other words, it was possible to concede that there can be no criminal liability for an involuntary act, and then to explain that this rule did not assist the defence as Jarmain's pressing of the trigger was not ' involuntary ' nor an ' act '.

The immunity for involuntary conduct is usually illustrated by cases in which the action is impelled by extraneous force or in which the absence of physical control would be established beyond doubt, as by sleep-walking, insanity, or sudden illness. Thus, Mr. Turner speaks of the case where

> B holds a weapon and A, against B's will, seizes his hand, and the weapon, and therewith stabs C; and possibly an act done under hypnotic suggestion or when sleep-walking [an instance of this is provided by *Fain* v. *Commonwealth*, 1879, a decision of the Court of Appeals of Kentucky, 78 Ky. 183, 39 Am.Rep. 213, quoted in Michael and Wechsler, *Criminal Law and its Administration* (1940), p. 29] or by pure accident. In certain cases of insanity, infancy and drunkenness the same defence [of involuntariness] may be successfully raised.

It would not seem difficult to distinguish cases of this kind, or those quoted by Humphreys J. in *Kay* v. *Butterworth*, from the absent-minded and unintentional pressing of a trigger. A strict interpretation of ' involuntary ' would, moreover, have much to commend it on grounds of policy.

Again, it would seem that in considering the defence of involuntariness the whole of the accused's conduct should be considered rather than an act forming merely part of it. The importance of this point was stressed by the Court in *Jarmain's Case*, where Wrottesley J. explained that—

> in effect, the argument for the appellant rests on the

> proposition that you must isolate the pressure of the appellant's finger on the trigger of the pistol from all the surrounding acts and circumstances which made it a deadly thing to do. *The act in the performance of which the appellant killed the woman was robbery with arms which was compounded of many elements and circumstances.* The pistol must be loaded, cocked and presented at the woman as well as fired in order that her death might result. . . .

In American decisions on constructive murder the same point has been made by using the conception of *res gestæ*, defined in *State* v. *Turco* (1923), 99 N.J.L. 96, as ' those circumstances which are the undesigned incidents of a particular litigated act '. (See also Michael and Wechsler, *op. cit.*, pp. 222–3.) It may not be advisable to introduce the terminology of the law of evidence into substantive criminal law, but it has the merit of drawing attention to the danger of adopting what might be described as an atomistic approach to problems of criminal liability.

In conclusion, it is submitted that it is preferable to treat *Jarmain's Case* as turning on the meaning of ' involuntary ' and on the meaning of ' act ' rather than as authority for an extension of constructive murder at the expense of the principle of the criminal immunity for involuntary conduct.

J. Unger.

THE ABSOLUTE BARS TO DIVORCE

Section 178 (2) of the Judicature Act, 1925, as amended by section 4 of the Matrimonial Causes Act, 1937, provides that the Court shall dismiss a petition for divorce if it is not satisfied as to the absence on the part of the petitioner of connivance at adultery, condonation of adultery or cruelty, or collusion with the respondent whatever be the ground of the petition. The whole section is of fundamental importance in our divorce law because section 178 (1) entrusts the Court with the duty of inquiring, so far as it reasonably can, into the existence of the above matters, thus justifying the frequent statement that divorce by consent or in default of defence is unknown to English law. It is therefore somewhat surprising that much obscurity should surround such questions as the onus of proof, the nature of collusion, the extent to which a husband may negotiate as to damages with the co-respondent without being guilty of connivance, and the effect of condonation. In view of the practical importance of these matters any case which

tends to throw light on them is worthy of comment, and it is proposed to discuss three decisions of last year under the four headings already indicated.

Before doing so, however, it will be convenient briefly to state the facts of two of these. In *Churchman* v. *Churchman*, [1945] P. 45, the petitioner had indulged in lengthy negotiations with the co-respondent, who was throughout living in adultery with the respondent, as to the amount at which he would be prepared to compromise the claim for damages which he constantly threatened to make. These proved abortive, and the Court of Appeal held that Denning J., although rightly regarding the case as one in which no award of damages should be made, was wrong in dismissing the petition on the ground of connivance, because an attempt to make a collusive bargain for an admitted wrong could not be held to have effected a notional conversion of the petitioner's strenuous objections to the respondent's adultery into connivance at it.

In the later case of *Emmanuel* v. *Emmanuel*, [1945] 2 A.E.R. 494, Denning J. dismissed a wife's petition founded on cruelty because he was not satisfied as to the absence of collusion. The husband had filed an answer denying the cruelty and informed his wife that he was only defending the case because of the possibility that she would claim maintenance. Upon her stating that this was not her intention, he prepared an undertaking to this effect which she signed. The document was retained by the husband's solicitors against the protests of those acting for the wife. The answer was not immediately withdrawn, but, shortly before the hearing of the case, the husband's solicitors indicated that it would not be defended.

1. *The onus of proof.* Whatever view may be taken of the last-mentioned decision on its particular facts, there can be little doubt that the judgment of Denning J. coupled with that of the Court of Appeal in *Churchman* v. *Churchman* (*supra*) has clarified the law as to the onus placed upon the petitioner by the amended section 178 of the Judicature Act, 1925. (See also 61 *Law Quarterly Review*, 379 *et seq.*) Certainly he must prove a negative by satisfying the Court that there has been no connivance, condonation or collusion, but the altered wording has not, as it was at one time thought to have done, 'swept away' the presumption of law against connivance. (*Germany* v. *Germany*, [1938] P. 202 at p. 206; *Poulden* v. *Poulden*, [1938] P. 63; *Lloyd* v. *Lloyd*, [1938] P. 174.) The presumption remains to assist the petitioner, but it is, as Denning J. points out in *Emmanuel* v. *Emmanuel*, [1945] 2

A.E.R. at p. 496, ' a provisional presumption ' only; ' a presumption (like the presumption of testamentary capacity or the presumption of negligence in cases of *res ipsa loquitur*) from which the Court may (not must) infer the fact in issue and which puts on the other side (when there is one) the provisional burden of calling evidence or taking the consequences '. Hence, when the Court's suspicions are aroused, the petitioner is left where he began with the ' legal burden ' of proving the absence of connivance, collusion or condonation ([1945] 2 A.E.R. at p. 497).

It would be beyond the scope of this note to comment in detail on the distinction drawn by Denning J. between the legal and provisional burdens of proof, and one may be permitted respectfully to agree that the matter is substantially one of ordinary good sense ([1945] 2 A.E.R. at p. 496). Nevertheless, it is one thing to enunciate the law with clarity, and another to apply it, and it is in the latter respect that the position with regard to the onus of proof placed on the petitioner by section 178 of the Judicature Act, 1925, seems questionable. This is particularly true of collusion, for, as is shown by the facts of *Emmanuel* v. *Emmanuel* (*supra*), the answer to the question whether it exists or not may lay in the mouth of the respondent alone. Such cases as *Beattie* v. *Beattie*, [1938] P. 99, in which the petitioner accepted a sum of money from the respondent to cover her costs, show how the legal burden of proof may be discharged although the suspicions of the Court are aroused. For, on the particular facts, the President was satisfied that the petitioner had decided totake divorce proceedings for reasons of her own independently of the inducement offered by her husband. In *Emmanuel* v. *Emmanuel* (*supra*) it was the petitioner's inability to satisfy the Court that her husband had not abandoned a good defence on the merits because of the undertaking as to maintenance which proved her undoing. The soundness of the Court's suspicions could only have been ascertained if the case had been defended, and, although in other branches of the law where judgment by default is not unknown, one may approve the distinction between the legal and provisional burdens of proof, its practical working in divorce may be open to question if the petitioner's chances of discharging the legal burden which is cast upon him are, in a case arousing suspicion, likely to be enhanced by the fact that a suit is defended.

2. *The nature of collusion.* This, however, is but one aspect of the larger problem as to what, in the eye of the Divorce

Court, amounts to collusion. The matter is dealt with in a most interesting way in the judgment of Denning J. in *Emmanuel* v. *Emmanuel* (*supra*). He recognises that the law cannot prevent the parties from making arrangements in contemplation of divorce proceedings, and puts the case of an innocent wife whose husband provides evidence of adultery, offers maintenance and costs, and ' generally does all that he can to persuade her to bring proceedings ' ([1945] 2 A.E.R. at p. 495). He concludes that the acceptance of the offer is not by itself collusion, ' if she stoops, however, to accept a bribe, that is collusion, because the Court cannot be sure that she genuinely seeks relief '. The premise of the whole of this part of the judgment is that ' in order to secure the proper administration of the divorce law, the court requires that every petitioner must have received a real injury and genuinely seek relief, and that he shall deal with the court with the utmost good faith ' (at p. 495). Few lawyers would deny that this is an admirable summing up of the effect of section 178 of the Judicature Act, 1925, but the real difficulty is to know what, in a given case, amounts to collusion. If it exists, the Court is bound to dismiss the petition, but, on the reported cases, it is submitted that it is virtually impossible for the practitioner to advise whether it does, or will, if a certain course of action is pursued, exist (*Malley* v. *Malley*, 25 T.L.R. 662; *Scott* v. *Scott*, [1913] P. 52; *Laidler* v. *Laidler*, 36 T.L.R. 510).

The duty of dealing with the Court with the utmost good faith, and the knowledge that ' no such agreements are valid without the sanction of the Court, except those made after decree absolute ' ([1945] 2 A.E.R. at p. 496), are of no assistance at the inception of divorce proceedings. It is submitted that it is a disgrace to the administration of the law, the soundness of which, in this particular instance, is at least as dependent on litigants and their advisers as it is upon the judiciary, that the standard work on divorce should have to state that ' collusion ' is not ' a well-understood term ' (*Rayden on Divorce* (4th ed.), p. 130). If, on facts such as those in *Emmanuel* v. *Emmanuel* (*supra*), where there was no stipulation by the petitioner or undertaking by the respondent that the proceedings should be undefended, the Court has to be satisfied as to the reason why what may have been a good defence on the merits was abandoned, the onus on a frank petitioner in an undefended case may be well-nigh insuperable. There is some danger that we may be reverting to the days when it was thought that absence of ' recrimination ' might of

itself be evidence of collusion (see citation of evidence given by Dr. Lushington before the Royal Commission on Divorce in 1848 in *Churchward* v. *Churchward*, [1895] P. 7).

3. *Connivance and damages against the co-respondent.* In *Churchman* v. *Churchman* (*supra*) the presumption of innocence, provisional as it may be in divorce, served the petitioner in good stead. His attempts to secure damages had ceased before his petition was presented, so there could be no question of collusion. With regard to connivance, the Court of Appeal were able to apply the case of *Gipps* v. *Gipps and Hume*, 11 H.L.C. 1, in which the House of Lords were unanimous in holding that a compromise of a claim for damages against a co-respondent did not of itself amount to connivance at the respondent's subsequent adultery with him, although the majority took the view that, on the particular facts, an arrangement whereby the first petition for divorce was to be abandoned in consideration of further payments by the co-respondent did have this effect. Furthermore, the Court of Appeal expressly reserved its opinion as to whether the receipt by a petitioner of a sum of money, in pursuance of a collusive bargain as to damages, would, as Lord Merrivale P. appeared to think, amount to connivance at the wife's subsequent adultery (*Gifford* v. *Gifford*, 43 T.L.R. 141).

Churchman v. *Churchman* (*supra*) may therefore prove to be of assistance in cases in which the litigants, while still in a state of blissful ignorance as to section 178 of the Judicature Act, 1925, enter or endeavour to enter into arrangements of their own without legal assistance. However, before leaving the subject of claims for damages against the co-respondent, one may be permitted to doubt whether there is any justification for the retention of section 189 of the Judicature Act, 1925, under which damages for adultery can be claimed by a husband in the Divorce Court. If the common law right to sue in tort for damages for enticement where this exists is adequate for a wife, it is hard to see why it should not suffice for a husband. The possible co-existence of remedies by the latter may give rise to difficulties (*Menon* v. *Menon*, [1936] P. 200) and it is surely curious that the rules as to collusion should apply to the claim under section 189, which apparently cannot be compromised without the approval of the Court, and in relation to which there is no provision for payment into Court, whereas they cannot apply to the claim in tort.

4. *The effect of condonation.* 'Condonation' is a well-understood term, and it is only in relation to the doctrine of

revival that problems are likely to arise (*ante*, Vol. VIII, at pp. 149 *et seq.*). In *Beard* v. *Beard*, [1945] 2 A.E.R. 306, the Court of Appeal by a majority held that desertion for a period of less than the three years required to found divorce proceedings revives condoned adultery so as to render it available as a ground for divorce. To have held otherwise would, in the opinion of Scott L.J. (at pp. 314–5) have been ' socially intolerable '. He concluded that ' the trend of judicial decision from 1730 onwards to the present year has been to uphold the rule that the bar of condonation continues only so long as the matrimonial conduct of the repentant spouse continues to be such as a Divorce Court can accept as consistent with matrimonial duty '. The sociological basis of the dissenting judgment of Vaisey J. is to be found in his doubts (at p. 318) as to the desirability of a law which ' enables a wife or a husband to obtain as of right a divorce from the other in their old age upon the ground of one single act of adultery committed by the other in the time of their far-off youth and immediately condoned, but now raked up from the past upon some petty provocation insufficient in itself to be a ground for the relief so tardily sought '. The legal grounds for his dissent are summed up in his view that ' condoned offences can be revived . . . to complete a picture but not to convict of their own force '.

From the sociological point of view the solution of the problem may be that desertion for a period shorter than that required to found divorce proceedings should suffice to revive condoned adultery or cruelty, but that, after a given period of time, the forgiveness should be deemed to become absolute so that it would not be possible for the condoned offence to be ' raked upon from the past upon some petty provocation '. It is, however, difficult to see how this result could be achieved by the judiciary, and, from the legal point of view, the following criticisms may respectfully be made of the judgments of the majority of the Court of Appeal in *Beard* v. *Beard* (*supra*).

(i) It is historically incorrect to speak of desertion as having been a matrimonial offence in the same sense as adultery or cruelty before the coming into force of the Matrimonial Causes Act, 1857, because it did not, as they did, excuse the petitioner from the performance of matrimonial duties. His willingness to fulfil these was a *sine qua non* of success in obtaining a decree for restitution of conjugal rights reaffirming the continued existence of the marriage tie, while adultery or cruelty discharged the matrimonial obligations and might found a decree for divorce *a mensa et thoro* dissolving the marriage

bond so far as the Ecclesiastical Courts could do so. *Hart* v. *Hart* (1855), 2 Ecc.&Ad. 193, is in fact a decision to the effect that condoned cruelty was not revived by desertion (at p. 200).

(ii) In all the relevant decisions from 1857 onwards it seems that the desertion was of a nature sufficient to found a decree for judicial separation, and it is submitted that this fact was crucial. Thus, in *Price* v. *Price and Brown*, [1911] P. 201 at p. 202, it was said ' Here there has been statutory desertion under section 5 of the Matrimonial Causes Act, 1884. This undoubtedly creates a matrimonial offence, because, under that section, *either party has a right to apply for a decree of judicial separation, on the ground of non-compliance with a decree for restitution of conjugal rights* '. (The italics are the writer's; the case does not appear to have been cited in *Beard* v. *Beard*, *supra*.)

(iii) The criterion of such conduct ' as a Divorce Court can accept as consistent with matrimonial duty ' as that which will suffice to prevent the removal of the bar of condonation is likely to prove difficult to apply. The majority judgments appear to approve *Winscom* v. *Winscom and Plowden* (1864), 3 Sw.&Tr. 380, and *Ridgway* v. *Ridgway*, 29 W.R. 612, in which a wife's amorous association with another man and a husband's solicitation of chastity were respectively treated as sufficient to revive condoned adultery. These are not matters which are covered by any statute, and it may be argued that such offences as wilful neglect to maintain and habitual drunkenness, which come within the Summary Jurisdiction (Separation and Maintenance) Acts, are *a fortiori* sufficient to bring the doctrine of revival into play. Perhaps, therefore, *Beard* v. *Beard* (*supra*), though temporarily solving one vexed problem in a branch of the law where certainty is essential, will come to be regarded as a case which raises more problems than it solves.

To sum up this somewhat lengthy note, it may be said that there is room for reform within the framework of our present divorce laws, which require that ' every petitioner must have received a real injury ', by the restriction of the rules as to collusion to cases where there is an agreement not to defend or otherwise to impede the Court in the fulfilment of its duty under section 178 of the Judicature Act, 1925, by a modification in the law as to damages against a co-respondent, and by a precise definition of the wrongs which revive condoned adultery or cruelty. In view of the paucity of appeals in divorce the first and third of these should, as the second must, come from the Legislature rather than the judiciary.

Rupert Cross.

TRADING WITH THE ENEMY

The appeal against the decision of the Court of Appeal in *Schering Ltd.* v. *Stockholms Enskilda Bank* was recently dismissed by a majority of the House of Lords consisting of Lords Thankerton, Porter and Goddard, Lord Russell of Killowen and Lord Macmillan dissenting: [1945] 1 A.E.R. 36.

The facts of the case as well as the reasons given in the Court of Appeal by Lord Greene M.R. on behalf of himself, Lord Clauson and du Parcq L.J. were reviewed in 7 (1944) Mod.L.Rev. 159 and need not be restated. The net result of the decision reached in the House of Lords may be summarised as follows: public policy does not invalidate a pre-war contract under which a British subject (in the territorial sense) is liable to pay a sum of money to a neutral (in the territorial sense) in discharge of the liability of an enemy, it being irrelevant that payment by the British subject involves not only an assignment by the neutral creditor to the British payor of his claim against the enemy, but also results in a substantial reduction of the enemy's liability.

This result was reached by the Court of Appeal on the ground that there was a distinction between contracts between a British subject and an enemy and contracts between a British subject and a neutral, and that, in the latter case, the outbreak of war invalidated the contract only if the benefit accruing to the enemy was real, while in the present case the benefit was so vague and uncertain as to permit suspension rather than abrogation. This line of reasoning was incidentally rejected by the Law Lords, but, what is more remarkable, it was not even put forward on behalf of the Swedish bank before the House of Lords. The explanation probably lies in the fact that shortly after the Court of Appeal had rendered its judgment, the second edition of Sir Arnold McNair's book on *The Legal Effects of War* appeared, and that the learned author there suggested an argument in support of the Court of Appeal's decision of which Lord Greene's judgment contained little trace, but which appealed to the Swedish bank's counsel and, as it turned out, carried the day. Sir Arnold McNair said (at p. 238) that the clue to the decision was to be found in the fact that the contract was an executed one:—

> The British company had received as long ago as 1936 the full benefit of the contract in the form of an advance of £84,000 by the Swedish bank to a German company of which it was a subsidiary, and all that remained of the

contract was the liability of the British company for the payment of an agreed sum of £54,000 to the Swedish bank by instalments over a period of eight years.

If the facts had been as stated by Sir Arnold McNair, it would indeed not have been open to doubt that the contract was an executed one, and accrued rights are not affected by the outbreak of war, though the right of suing in respect thereof is suspended. Lord Thankerton was incontrovertibly right in saying (p. 41) that ' the effect of the outbreak of war upon contracts legally affected by it is to abrogate or destroy any subsisting right to further performance other than the right to the payment of a liquidated sum of money, which will be treated as a debt and will survive the outbreak of war '.

Was, then, the contract under consideration an executed contract within the meaning of this rule ? The answer depended not on legal principle, but on the facts. The House divided on a very narrow issue. According to the contract payment by the English company relieved the German company of a substantial part of its liability and, also, the English company's obligation to pay was entered into in consideration of the assignment to it by the Swedish bank on the occasion of each payment of a like sterling amount of the Swedish bank's claim against the German company. As regards the latter provision in particular, in the earlier case between the same parties, reported [1941] 1 K.B. 424, at p. 435, Lord Greene had said that the Swedish bank's remedy against the English company was not by action for debt, but by proceedings for specific performance of the contract of purchase, after execution and tender of a proper assignment of the debt the subject-matter of the purchase. Yet, in the view of the majority of the House of Lords, the provision for an assignment made no difference, since it was merely machinery, ' merely incidental to the discharge of the debt ' (*per* Lord Thankerton at p. 41), ' no more than a provision as to the method of payment and perhaps as some additional precaution ' (*per* Lord Goddard at p. 57). And Lord Porter emphasised (at p. 52) that in substance the final bargain was repayment by the English company of the German company's debt, not purchase by the English company of the Swedish bank's rights against the German company.

Lord Russell's opinion deals fully with these and other points made by the majority. In common with Lord Macmillan he failed to see that this very special contract was a simple case of the Swedish bank having an accrued right to a

liquidated sum of money as to which it had nothing more to do than to collect what was due to it. The provision as to assignment gave the arrangement its essential feature, making it a contract for the sale and purchase of a number of choses in action on specified dates.

Lord Russell concluded his forceful opinion with the words :—

> One cannot but regret the unsatisfactory outcome of the argument in this House. The appeal fails for reasons which differ from those which prevailed in the Court of Appeal and which differ *inter se*. To me two decisive points stand out crystal clear, unanswered and, I venture to think, unanswerable : (i) the April contract, if performed in war-time, confers a distinct and immediate benefit on the enemy ; and (ii) as regards post-war instalments it was at the outbreak of war wholly executory '.

All will regret that this was one of the last speeches made by Lord Russell of Killowen as a Law Lord prior to his retirement. Many will regret that it failed to prove the last word on the point to be decided. If the majority had not treated the conception of an executed contract as a rigid one, but had allowed it greater flexibility and adaptation to the facts of each case, it would have been possible to avoid a result which, it is believed, runs counter to overriding principles of public policy.

F. A. Mann.

' DOUBLE TAXATION ' OF FOREIGN DIVIDENDS

The expression ' double taxation ' in relation to dividends payable by foreign companies to their British shareholders can be understood in two senses. In the first, and more usual sense, it means that the dividend has been subjected to income tax both by the law of the country of foreign incorporation and again under the British income tax code ; as respects this form of double taxation, provision for a form of relief has been made by section 49, Finance (No. 2) Act, 1945, and Article VI of the recent Convention between this country and the U.S.A. for ' The Avoidance of Double Taxation ', Cmd. 6624 of 1945. In its other, and more restricted sense, the term ' double taxation ' of foreign dividends has come to mean—as a result of the sixty-year old decision of the Court of Appeal in *Gilbertson* v. *Fergusson* (1881), 7 Q.B.D. 562—the taxation *in full* of a dividend received by a British shareholder from

a foreign company where part of that company's income, out of which the dividend was payable, has itself borne British income tax either by direct assessment in respect of income arising in this country or by deduction of tax at the source. This note is concerned solely with ' double taxation ' in this latter sense.

In *Gilbertson* v. *Fergusson* a foreign bank had a London agency to which it dispatched moneys to be distributed as dividends to its British shareholders; the agency was, of course, liable to direct assessment in respect of its profits made from trading within this country, but it was also held to be liable to tax in respect of the dividends distributed by it here: see section 10, Income Tax Act, 1853, now rule 7, Miscellaneous Rules, Schedule D, Income Tax Act, 1918. The Court of Appeal held, however, that the charge upon the agency in respect of these dividends must be reduced by the proportion that the bank's profits from trading in this country bore to its total profits, insomuch as the former had already suffered British income tax and were part of the fund out which the dividends were ultimately payable. This overriding principle of revenue law, whatever the statute appeared to say, was laid down thus by Brett, L.J. :—

> Now it may be that there are no specific words which point out that the Government are not to receive tax twice over but it would be clearly unjust and contrary to the meaning of the statute that the Government should have the tax payable twice over *by the same person in respect of the same thing*. . . . Therefore, if part of the dividends in respect of which income tax is payable is also in respect of profits earned from a business in England, the tax on that part would have to be paid twice over, which ought not to be—7 Q.B.D. pp. 569–70.

It must, however, be noted that this case was decided under the now-exploded theory that a company paid tax on its profits *as agents* for its shareholders; the bank's shareholders were therefore regarded as having paid tax, first by a direct assessment upon the London agency's profits and again by way of deduction of tax from their dividends. On the authority of this alleged overriding principle of revenue law, it became the practice of the Revenue authorities, for the following sixty years, to relieve British shareholders of a proportion of the income tax due on their foreign dividends calculated by reference to the aggregate income of the foreign company and the share thereof which had been subjected to British income tax.

In recent years, however, the House of Lords has made it abundantly clear that this identification of shareholders and their company has no place in our income tax code. A company is chargeable to tax on its own profits and pays tax in discharge of *its own* liability—see *Neumann* v. *Inland Revenue*, [1940] A.C. 215, and *Cull* v. *Inland Revenue*, [1940] A.C. 51, noted at 3 Mod.L.Rev. 316–7; its shareholders are not *directly* chargeable to income tax on their dividends (*é contra* as regards surtax) although, on payment thereof, the company is entitled to deduct a proportionate amount of the tax therefrom (rule 20, All Schedules Rules, Income Tax Act, 1918).

The first challenge by the Revenue to this alleged principle of ' double taxation ' was in *Barnes* v. *Hutchinson*, [1940] A.C. 81, where the respondent received preference dividends, at a fixed rate, from his holding in an Indian company which itself had received dividends—under deduction of British income tax —from ordinary shares in two British companies. The respondent had been charged under Case V of Schedule D on the *full* amount of his dividend but had successfully contended in the Court of Appeal that, under the rule in *Gilbertson's Case*, he was entitled to be relieved from British income tax proportionately to the parts of the Indian company's income which had and had not suffered such tax. The House of Lords decisively rejected this claim on the simple ground that, under its earlier decisions, *cf. supra*, it was clear that a shareholder's dividend was an income different from that of the company; the respondent had received in full the fixed preference dividend to which he was entitled and therefore could not be said in any way to have suffered British income tax thereon. *Gilbertson* v. *Fergusson* was distinguished on its different facts, *viz.*, the London agency of the foreign bank had itself been *directly* charged to tax.

In *Canadian Eagle Oil Co., Ltd.* v. *R.* and *Selection Trust, Ltd.* v. *Devitt*, [1945] 2 A.E.R. 499, the House of Lords had squarely to face the issue whether, in view of its prior decisions, the rule in *Gilbertson's Case* could be regarded as still subsisting as regards dividends, other than at a fixed rate, received by British shareholders from foreign companies. In the former case the petitioners, a non-resident foreign company not carrying on any trade in this country, paid dividends to its British shareholders through ' paying agents ' here who deducted the full amount of the tax; the company's profits, out of which these dividends were paid, included not only dividends from British companies received under deduction of

tax but also income arising in this country which had been *directly* charged to tax. In the latter case, the appellants were a British company, part of whose income consisted of dividends from American companies whose income in turn was made up of taxed dividends received from British companies.

Although *Gilbertson* v. *Fergusson* had stood as good law for some sixty years, the House of Lords found no difficulty in overruling it upon two grounds. In the first place, its very *ratio decidendi* had completely disappeared since it was now established that the income of a company and the income received from it by its shareholders were two distinct incomes accruing to two distinct persons; accordingly, the fact that the foreign company's income had been in part subjected to British income tax could in no way be said to infer that the dividends received by its shareholders had similarly suffered such tax. In the second place it was beyond the province of the Courts to correct an alleged hardship or remedy an injustice by implications or by overriding principles not based upon the specific language of the statute; there was nothing in the Income Tax Acts from which one could imply any ' general principle ' against double taxation. It was also observed that, in any event, British Revenue officials had no power to investigate the constitution of a foreign company's income.

In conclusion it was pointed out that the rule as to deduction of tax at source by a company on payment of dividends (rule 20, All Schedules Rules, *supra*) applied only to British companies. British shareholders of foreign companies were chargeable to income tax on their dividends either by way of direct assessment under Case V of Schedule D, or by deduction of tax under rule 7 of the Miscellaneous Rules, Schedule D, where payment was made in this country through ' paying agents '.

A. Farnsworth.

REVIEWS

THE PURE THEORY OF LAW. By WILLIAM EBENSTEIN, Associate Professor of Political Science, University of Wisconsin. (Madison, Wisconsin: University of Wisconsin Press. 1945. xii and 211 pp. $2.50.)

OF the many divergent movements which the present century has seen in the realm of legal theory probably the most important and certainly the most vehemently debated is the doctrine of Hans Kelsen and his followers (the Vienna School), which bears the apt descriptive title of the Pure Theory of Law—*Die Reine Rechtslehre*. As Professor Ebenstein remarks, 'A school of legal thought that can cause intellectual storms from Belgrade to Tokyo has achieved no mean feat'. Even in England and America it has not been ignored; the Introduction to the present volume records some sixteen works in English, mostly articles in periodicals, in which it has been expounded or discussed. (The author has, however, apparently missed the chapter by R. T. E. Latham in Vol. I of the *Survey of British Commonwealth Affairs*, O.U.P., 1937, and also a paper by the present reviewer in *Grundfragen der Rechtsauffassung*, Munich, 1938.) But on the whole it has received 'comparatively little attention' in the common law countries. A glance at the first chapter of the present volume may help to explain this neglect. The legal philosopher, as he exists on the Continent, is a rare creature in England; the pure lawyer, as distinct from the Pure Theorist of Law, has seldom enjoyed an education which comprises a study of Kant's *Critique of Pure Reason* and is impatient of legal writings which cannot be comfortably assimilated without such preliminary philosophical exercises.

Yet, if the English lawyer could overcome this initial difficulty, he would probably find that of all Continental legal philosophies the Pure Theory of Law fitted most congenially to his own traditional way of thinking. This is perhaps another reason why it has received 'comparatively little attention' from him; he finds in its practical and political implications little or nothing to shock his cherished beliefs. Since 1688 he has never doubted the maxim that *Rex debet esse sub lege*; even if he complains of modern bureaucratic tyranny, what he is complaining of is a tyranny formally created by law. The Continental doctrine that the Administration can be above the law, that the administrative act 'carries its own validity', is strange and repulsive to him, and its denial by the Pure Theory of Law awakens in him only the mild approval of one reading a self-evident proposition. Even if, like Salmond, he pays lip-service to the view that the State is the creator of the law, he

does not dream of identifying this meta-legal creator of the law with the administrative entity called ' the State ' (or, in English parlance, ' the Crown ') which appears as a party to legal proceedings, and of arguing that, this entity being superior to the law, its organs must therefore be exempt from all legal control; he therefore fails to appreciate the importance of Kelsen's onslaught on the traditional German doctrine of the State. Nor is he shocked by the denial that there is any essential distinction between public and private law, for this distinction has never meant very much to him. Legal rights, again, are for an English lawyer the creation of the law; he is puzzled by the vehemence of Duguit's attack on the concept of *droit subjectif* until he realises that to a Continental lawyer *droit subjectif* generally suggests a right in the individual prior to the law; therefore he finds nothing heretical in Kelsen's contention that ' there is only such a thing as a subjective right because and in so far as the objective norm recognises it '. Since Hohfeld (to whom Professor Ebenstein might have referred on pp. 173–4) he has doubted the validity of the absolute distinction between rights *in rem* and rights *in personam* which some of his jurisprudential teachers have imported from Roman law, and it is with no sense of discomfort that he learns that to the Pure Theory of Law the distinction is merely relative. And finally, in treating of the interpretation and application of law, the Pure Theory of Law, in Professor Ebenstein's words, ' arrives at a position which is as revolutionary for Continental jurists as it is a matter of course for American and English jurists : " If legal science wants to be able to say what law is for the individual case, then it must ask the judge " '.

But it is not merely the practical conclusions of the Pure Theory of Law that should be congenial to the English lawyer. Its whole structure is remarkably similar to the analytical jurisprudence taught in his law schools. The Pure Theory of Law would agree with Holland that ' Jurisprudence is the formal science of positive law '. It does not deny the value of ethical, sociological and other methods of study; it simply insists that pure analysis of the form of legal thinking should not be contaminated by the influence of concepts belonging to these other methods. The exposition of the Pure Theory of Law might well adopt Austin's title, ' The Province of Jurisprudence Determined '. It might almost be said to repeat Austin's analysis, but on ' purer ' lines, eliminating two foreign elements the impropriety of whose presence Austin had not suspected, namely: (i) the concept of the Sovereign, that is, of certain factual political conditions, as a necessary presupposition of law, and (ii) the concept of factual effectiveness, which was imposed on Austin partly by his doctrine of the Sovereign and

partly by his view of law as a matter of command and obedience, that is, of psychological fact.

To the Pure Theory of Law law consists of normative propositions, to be conceived not as commands addressed to the will of a subject, but as hypothetical propositions whose main verb is not ' Is ' but ' Ought '—propositions in the form, ' If X is, then Y ought to be '. ' The Ought here says nothing of the value or absence of value of the facts it relates; it merely expresses their specifically legal connection.' ' The Ought of law is a purely formal category.' (Austin said this in his own terminology when he said, ' Command and duty are correlative terms. . . '.) The lawyer's task is simply to consider the interrelations of the various propositions of this kind which make up a system, and, in particular, to determine the validity of each with reference to the appropriate higher norm, until he reaches the highest (or basic) norm upon which the validity of the whole system depends. For purely legal thought this basic norm can only be postulated: any attempt to justify it (as Austin did by tying it to the factual existence of a Sovereign) is outside the province of legal thought properly so-called. Essentially there need be only two stages in the legal process—the basic norm and the application of compulsion to the subject (as when an absolute ruler, acting under the basic norm that the ruler's will is law, inflicts punishment with his own hand)—but usually there are several (*e.g.*, basic norm defining the supreme legislator—statute passed by the legislator—administrative regulation under the statute—judicial decision on the application of the regulation to a particular case—order for enforcement of the decision—application of constraint to the individual), each, after the first, involving an act of will and therefore, in its own degree, of law-making. This part of the Theory is called in German the *Stufenbau des Rechts*, a phrase not very happily translated in the present work as ' the Steps-and-Stairs Theory of the Law '. It enables the Pure Theory of Law to avoid on the one hand the tendency of most Continental jurists to concentrate on the part played by statute in the making of the law, and on the other hand the tendency of American ' realists ' to concentrate on the part played by the judge. It also helps us to see (cf. pp. 160–161 of the present work) that political theory falls into error when it looks only at the constitution of the Legislature as the ground for classifying the constitutions of States. ' The form of State can be determined only by an analysis of the law-making stages above and below that of statute.'

Professor Ebenstein will perhaps pardon us for saying so much about his subject and so little as yet about his treatment of it. After all, the object of his book is not to put forward

his own ideas but to expound a body of received doctrine. This he has done with fidelity and sincerity. His knowledge of the classic writings of his school cannot be questioned, and he shows an extensive acquaintance with other writers, English and American, as well as Continental, whose outlook has points of similarity or of significant contrast to that of his masters. His work may well become for English readers the standard exposition of the Pure Theory of Law. But, having paid tribute to its substantial merits, we may permit ourselves a few criticisms. The difficulty which the average English reader will find in the philosophical approach has already been mentioned; but this is inherent in the study of all Continental legal theory. The difficulty, known to every translator, of dealing with the German word *Recht* has not been overcome (see especially pp. 162–165). One grants the difficulty of giving a clear and systematic exposition of a far-reaching theory—the expositor must explore side-issues and introduce parenthetic comment and notes of comparison—yet the Pure Theory of Law is remarkably coherent and systematic, and one cannot help feeling that a little rearrangement of his material, and perhaps even the exclusion of some points, would have made Professor Ebenstein's exposition clearer. For instance, the important point that the Pure Theory of Law is to be compared with Kant's epistemology rather than with his ethical teaching is nearly made on p. 18 and again on p. 27, but it emerges into the full light of day only when, after touching on many other matters, we reach pp. 87–88, and the rejection of factual effectiveness as a test of legal validity, although it fits well enough where it comes in the study of legal positivism on pp. 111–112, might find itself even more at home in Chapter II, which is mainly devoted to showing how the Pure Theory of Law rejects various non-legal elements. And, while all Kelsen's writing about natural law is interesting and valuable, so much of it as is not concerned with the distinction between natural law and positive law might be regarded as not strictly relevant to the exposition of the Pure Theory of Law.

On p. 53 we are promised that a detailed study of Verdross's ideas and an estimate of his position in the school will be given later. The Index does not contain any reference to Verdross later than p. 53. Search of the text discovers some four or five later references, but none that can reasonably be said to amount to the promised study in detail. This is not the only fault of the Index. The references in the text to, *e.g.*, Del Vecchio on p. 201 and Weyr on pp. 135 and 172, are not mentioned in the Index, and a number of the references in the Index, especially to the later pages of the text, are incorrect, *e.g.*, Cole p. 144 should be p. 143, Goodhart p. 203 should be p. 201, Laski p. 206 should be p. 204, and Salmond p. 205

should be p. 203. We have also noted a good handful of misprints in the text and (on pp. 185 and 193) the gratuitous repetition of whole lines. These are blemishes on a serious and valuable work.

A. H. Campbell.

Legal Aid. By Robert Egerton, m.a., ll.b. (London: Kegan Paul, Trench, Trubner & Co., Ltd. 1945. xvi, 160 pp. 10s. 6d. net.)

The average middle-class Englishman is very self-satisfied about the administration of justice in England. He knows vaguely that it is a bit expensive, but believes that good things are never cheap, and since he seldom or never bumps up against the law, save when, perhaps, he forgets to switch on the sidelights of his motor car, he does not realise that to the majority of his fellow-citizens this expense has very nearly meant in fact a denial of justice. Occasionally he may see quoted the late Lord Darling's remark that like the Ritz Hotel justice is open equally to the rich and to the poor, but since this is obviously intended to be funny he does not appreciate that there can be a truth in it.

Ignorance of one's neighbour's life and fortune is typical of middle-class life under a capitalistic regime, and up to a point is understandable. For a Government, however, whose job it is to know the conditions under which social solidarity is to be attained ignorance is inexcusable. The charge against British Governments, and particularly against those who held power in the period between the wars, in connection with the denial of justice to the less well-off sections of the community is more than that of ignorance, it is one of sin, the sin of deliberately neglecting to take the steps clearly necessary to provide even a stop-gap solution to the problem.

No one could read the well-documented and temperate account of the matter given by Mr. Egerton in this book without a feeling of shame, not only at a record so deplorable in itself, but that this country, and indeed the whole British Empire, with the honourable exception of Australia, should be so far behind almost all other civilised communities in respect of provision for the assistance of poor people in their legal difficulties.

Mr. Egerton provides a careful though not too detailed account of the at best niggling and often reactionary steps taken on the advice of committees presided over by distinguished judges such as P. O. Lawrence and Lord Finlay. Here, where there was no strong public opinion to spur the governing

classes along, one gets a real insight into the amount of social security which a profit-dominated society will voluntarily provide for the weaker brothers. Poor people must not be assisted to get their just claims remedied lest they develop a taste for litigation, thought the Finlay Committee. The Lawrence Committee reported that the only effective way of making provision for poor persons was to hand the whole matter over to the legal profession, and in order that it might remain on a proper basis of Victorian charity the lawyers were to undertake the work gratuitously. That real and substantial help was given, though clearly only a small fraction of what was required, proves that there is a bigger streak of altruism in the legal profession than it is usually given credit for.

Typical of the whole system are the facts that though the county court with jurisdiction up to £200 is par excellence the poor man's court (for civil litigation) no provision for assistance has ever there been made. Nor has any official provision ever been made, apart from that developed in the armed forces during the war for morale purposes, for providing the essential advice without which rights may be lost before litigation is thought of.

In the domain of criminal law the record has been rather better, especially since the Poor Prisoners' Defence Act, 1930, enabled a defence certificate to be granted whenever ' desirable in the interests of justice ', but it has not sufficiently been acted upon.

Happily it looks as if this bad era were drawing to a close. The recent report of the Rushcliffe Committee [1] makes recommendations of a really liberal character which when implemented, as has already been promised by the Government, will make as satisfactory provision as is feasible outside a nationalised legal system. The value of Mr. Egerton's book appears from the close way in which his proposals have anticipated those of the Rushcliffe Committee. Where he differs, *e.g.*, in not wishing to give the legal profession complete control over the administration of the scheme, the present reviewer's sympathies are very much with him.

In his Appendices Mr. Egerton provides detailed particulars of the provision made for legal aid in all the large towns of England and Wales, and also gives a summary of the arrangements made in foreign countries. The Rushcliffe Report has by no means made Mr. Egerton's work obsolete, and its value will be readily appreciated by all those interested in this important subject. They cannot afford to miss it.

Chorley.

[1] Cmd. 6641.

MATRIMONIAL CAUSES. By S. SEUFFERT, Barrister-at-Law. Second Edition. (London: The Solicitors' Law Stationery Society, Ltd. 1944. xvi, 90, (index) 13 pp. 10s. 6d. net.)

THIS is the second edition of the author's commentary on the Matrimonial Causes Act, 1937. The first edition was published before the Act itself had come into operation and, in the author's own words, his original notes on the Act were therefore inevitably 'sketchy and many of them speculative'. This can certainly not be said of the new edition, which is admirably concise and complete. It embodies all the judicial decisions on the Act and the leading decisions on divorce law generally in compressed and accurate notes arranged behind each appropriate section of the statute. The book also contains the Matrimonial Causes Rules, 1944 (with some notes) and, in an appendix, relevant parts of other statutes dealing with matrimonial matters.

The notes, which are the main contribution of the book and add up to twenty closely-printed pages, are so good—all the dead timber, which overburdens and obscures so many textbooks, is omitted—that one cannot but regret that the author confines his commentary to the Act of 1937 and does not extend it to the statutes set out in the Appendix. Does not the title 'Matrimonial Causes' legitimately cover the Summary Jurisdiction (Married Women) Act, 1895, and so on? Perhaps not—but an enlargement of this book along its present lines to cover the whole field of matrimonial statutes may be something to look forward to in future editions.

In the meantime, this work can be warmly recommended to practitioners and (advanced) students alike. There is no better and more up-to-date guide to the Matrimonial Causes Act, 1937.

H. B. GRANT.

CITIZENS' ADVICE NOTES. The National Council of Social Service. (£2 2s. net.)

THESE notes provide, in compact form, a useful summary of war-time legislation as it affects the ordinary citizen. The book is in loose-leaf form and supplements with appropriate indices are issued from time to time.

The notes are not, nor do they purport to be, a legal textbook, though they would undoubtedly be of great assistance to any member of the profession who is conducting a Poor Man's Lawyer Centre. In one sense they go further than a law book, because they give a mass of useful information which, though not of a legal nature, will assist the ordinary citizen in ascertaining what his rights and duties are. Lists of useful

addresses, such as Petroleum Offices, Liabilities Adjustment Offices, Appointments Offices, Refugee Committees, etc., are an excellent feature of the publication.

The main sources of the notes are statutes, Statutory Rules and Orders, Government Circulars and Stationery Office publications, and Hansard. Relevant material on each subject is collected in potted form from the available authoritative sources. Anyone who wants to get married, join a pig club, change his grocer, buy a petrol lighter or run a house-to-house collection for charity will find some useful guidance in the notes, which cover a very large part of the average citizen's daily activities and problems. The notes are not rigidly limited to war-time legislation, and, where necessary, the pre-war position is considered.

The book is, of course, bound to suffer from the difficulty of keeping pace with new statutes and subordinate legislation, and possessors of the notes would do well to keep them annotated from week to week by noting the effects of new legislation on the blank pages, of which there are a number.

Another difficulty with which the editors of the notes have evidently been faced is shortage of space. To compress so much material into one volume inevitably means that some of the notes are rather jejune. Indeed, the task of summarising, for example, the Rent Restrictions Acts in the space of a few pages is one which, one feels, had better not have been attempted. Although there are warnings that on points of legal difficulty a solicitor or Poor Man's Lawyer Centre should be consulted, there is some danger that, unless intelligently used, such potted law may be misleading.

Incidentally, the addition of some detailed information about Poor Man's Lawyer Centres would be a great asset, as also a note about Poor Persons' Committees of Provincial Law Societies. The work of the Poor Persons' Committee of the Law Society should, I think, be dealt with under a separate heading, and not a mere postscript to the subject of divorce.

Nevertheless, in spite of the drawbacks inevitable in a publication of this kind, there is no doubt that the notes are extremely well done, and will be of great value to Citizens' Advice Bureaux, Welfare Officers, and Poor Man's Lawyer Centres.

K. M. Jaffee.

Requisition in France and Italy: The Treatment of National Private Property and Services. By Maurice K. Wise. (New York: Columbia University Press. 1944. viii and 207 pp. $2.75 net.)

This is a book of a strictly descriptive character. It deals with the methods employed in France and Italy to secure

property and services for the satisfaction of such urgent needs of the State as arise chiefly in war or other periods of emergency. In the case of either country the author describes the power of requisition and, in particular, the occasions for its exercise; the objects of requisition; the exercise of the requisitory power (authorities with power of requisition, procedure, etc.); and the right to indemnity. The material has been painstakingly collected and will no doubt be useful for those engaged in broader studies of comparative administrative law.

F. A. Mann.

Palmer's Private Companies. By J. Charlesworth. Thirty-ninth Edition. (London: Stevens. 1945. viii, 100 pp. 2s. 6d. net.)

The editing of this valuable little book is now in the capable hands of Dr. Charlesworth who, in his preface, discusses the bearing of the Cohen Committee's Report on private companies. He has added useful sections on the Liabilities (War-Time Adjustments) Acts, 1941 and 1944, which apply to private companies, and also on the important topic of income tax in relation to private companies. It is good to see that so much can still be given for 2s. 6d.

Chorley.

Publications Received

Death Duties. Consolidated Second Supplement to the Ninth Edition. By Robert Dymond. (London: The Solicitors' Law Stationery Society, Ltd. 1945. 2s. 6d.)

Bankruptcy Treatises. By Kurt H. Nadelmann. Reprinted from the University of Pennsylvania Law Review. Vol. 93, No. 1. September, 1944.

Arbitration in International Controversy. By Frances Kellor and Martin Domke. Issued by the Commission to Study the Organisation of Peace and the American Arbitration Association.

Western Hemisphere Control Over Enemy Property: A Comparative Study. By Martin Domke. Reprinted from Law and Contemporary Problems. (Durham: Duke University Law School.)

Harrison's Death Duties. Supplement. (London: Sweet & Maxwell, Ltd. 1s. net.)

"Common-Sense"—To-day. By Kurt Lachmann. (London: Torchstream Books. 2s. 6d. net.)

International Arbitration Journal. Vol. 1, No. 1. April, 1945.